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NOS. 82-1860 and 82-1862

In the

Supreme Court of the United States

October Term, 1982

SCHNEIDER MOVING AND STORAGE COMPANY,
Petitioner,

and

PROSSER'S MOVING AND STORAGE COMPANY,
Petitioner,

vs.

LORAN W. ROBBINS, et al., TRUSTEES OF THE CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION AND HEALTH AND WELFARE FUNDS,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

RESPONDENTS' CONSOLIDATED BRIEF

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QUESTION PRESENTED

Since they are not parties to the collective bargaining agreement and do not have direct access to its grievance mechanisms, may the trustees of employee benefit funds, as fiduciaries under ERISA and as third-party beneficiaries of the labor agreement, proceed directly to court to collect delinquent contributions and to compel audits of contributing employers' records even though these employers allege that their disputes with the funds require interpretation of the collective bargaining agreement and therefore prior arbitration?

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In the

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SCHNEIDER MOVING AND STORAGE COMPANY,
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PROSSER'S MOVING AND STORAGE COMPANY,
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vs.

LORAN W. ROBBINS,[1] et al., TRUSTEES OF THE CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION AND HEALTH AND WELFARE FUNDS,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

RESPONDENTS' CONSOLIDATED BRIEF

RESPONDENTS' STATEMENT OF THE CASE

Petitioners are public movers operating in and around St. Louis, Missouri. Respondents are the Trustees of the Central States, Southeast and Southwest Areas Pension and Health and Welfare Funds, two of the largest Taft-Hartley multiemployer benefit funds in the United States. For all times relevant to the underlying lawsuits, Prosser and Schneider were parties to collective bargaining agreements with Local

[1] Respondents are. Loran W. Robbins, Marion M. Winstead, Harold J. Yates, Robert J. Baker, Howard McDougall, Thomas F. O'Malley, and R.V. Pulliam, Sr., Trustees of the Central States, Southeast and Southwest Areas Pension and Health and Welfare Funds. Thomas F. O'Malley has been replaced by Arthur H. Bunte, Jr. Earl L. Jennings, Jr. is also a Trustee.

610, affiliated with the International Brotherhood of Teamsters. These agreements required Petitioners to make specified weekly contributions to the Funds on behalf of all persons covered by the agreements (Sch. Pet. for Cert., A 62-65; J.A. 6-8; 43-45; 76-79).[2]

These collective bargaining agreements incorporated the Trust Agreements governing the Central States Funds by reference (Sch. Pet. for Cert., A 62-64; J.A. 76-79). Articles III, Sections 4 and 5 of the Trust Agreements expressly authorize the Trustees to initiate judicial proceedings to collect delinquent contributions and to audit contributing employers' "pertinent records" (J.A. 22-23).

In March, 1977, and again in May, 1979, Central States conducted an audit of Schneider and rebilled the company. On both occasions, Schneider ignored the audit findings and the Funds' rebilling, contending that the company had paid what it thought it owed.[3] In April, 1980, the Trustees filed an action

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[2] Article I of the collective bargaining agreement "covers" *only* those employees in the four job classifications included in the bargaining unit which Local 610 represents: truck drivers, warehousemen, packers, and helpers (Sch. Pet. for Cert., A-45; J.A. 51). These "covered" employees may be "regulars," "seasonals," "casuals" or employees hired on a "temporary," "emergency" or "part-time" basis. Whether an employee falls into any one of these categories depends on such factors as when he was hired (e.g., "seasonal"), whether he has a regular job elsewhere (e.g., "part-time"); whether he passed the probationary period ("regular"), the understanding or circumstances under which he was hired (e.g., "temporary," "casual," "emergency"); how regularly he, *in fact*, worked ("casual"). The pension and health and welfare provisions of the collective bargaining agreement entitle only some of these employees to contributions (Sch. Pet. for Cert., A 49-51; 61-65; J.A. 57-61; 76-79). Contrary to Schneider's contention (p. 3 of Brief), there *is* a correlation between the level of benefits and contribution rates. The Funds offer the negotiating parties a schedule of benefits that specific rates can provide; the union and the employer then select the one they can afford.

[3] F. Schneider, the Company's President, admitted on deposition that a prior audit had taken place in 1977 and that the Funds had rebilled the Company. His deposition reads as follows (p. 16, ln. 25; p. 17, ln. 1-15):

> Q. Did you have an audit sometime in '77 by the Central States?
> A. Right.
> Q. And what were the results of the audit?
> A. It was stupid.
> Defendant's attorney: Answer the question as best you can.

(Footnote 3 continued on page 3.)

to collect the delinquencies assessed against the company. Schneider filed a Motion to Dismiss on the grounds that the alleged delinquencies sought to be collected involved employees who were not covered by the collective bargaining agreement, and that the Trustees had no standing to bring the action until the contract was interpreted through the appropriate grievance mechanism.[4]

The collective bargaining agreements did not permit *the Trustees* to invoke the grievance clause, notwithstanding the fact that problems of interpretation might be involved in a claim against the company. Nor could the employer invoke it (Sch. Pet. for Cert., 51-53).[5] Nevertheless, nothing in the

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(Footnote 3 continued from page 2.)

A. What do you mean the audit, what was the result?
Q. Did they rebill you?
A. They kept rebilling all the time.
Q. Well, did they send you a statement saying you owe more money?
A. They sent us a statement saying we owed them more than we thought.
Q. Did you ever pay that?
A. I paid them for what I thought I owed them.
Q. So partial payment pertaining to their estimate?
A. I paid them what I thought I owed them and that was it.

When asked whether, pursuant to the 1979 audit, the Funds sent another bill, Mr. Schneider responded: "I don't know. I guess they did. I don't know. I don't pay any attention to it." (Dep. F. Schneider, p. 18, ln. 5-6) (Appellants' Brief, pp. 17-18).

[4] Mr. Schneider contended that he employed only two classes of employees: "regulars" and "extras" (J.A. 39). Hence, the gravamen of the dispute between Schneider and the Funds was whether any of these "extras" could be classified in one of the above-described categories and hence be entitled to contributions. The issue before the Eighth Circuit and thus before this Court is *solely* in *what forum* this dispute should be resolved. The Appendix to Schneider's Brief has no bearing on this issue. Respondents have always conceded that the collective bargaining agreement contained ambiguities, but that these ambiguities were within the competence of federal courts to resolve.

[5] The grievance procedure was applicable only: "should differences arise between the *Company and the Union* or *any employee of the Company as to the meaning or application of the provisions of the agreement*" (A-51, emphasis supplied). Moreover, failure to comply with the pension and health and welfare provisions of the collective bargaining agreement exposed the employer to economic action by the union upon five days' notice (Article XXI, Sch. Pet. for Cert, A-72). (This was also true of Prosser's contracts, except that the 1979-1982 collective bargaining agreement also permitted the employer to request arbitration of appropriate grievances (J.A. 56).

record indicated that Schneider had ever attempted to discuss its "coverage" problems with the Union although "coverage" disputes with the Trustees existed since the first audit.

Only the Union could set the grievance mechanism in motion. Significantly, by the time Schneider filed a Motion to Dismiss the Trustees' collection action on account of their failure to exhaust intracontractual remedies, the Union had already been decertified for more than a year; moreover, the collective bargaining agreement had expired.[6]

The gravamen of the Trustees' Complaint against Prosser was that Prosser refused to permit an audit of the company's "pertinent records" as specified in the Trust Agreements. Although Prosser's collective bargaining agreement expressly incorporated the Trust Agreements by reference (J.A. 76-79), the company contended that the scope of the Trustees' administrative authority, as applied to it, required contractual interpretation. Hence prior submission to arbitration was necessary.[7]

The district court decided the *Schneider* and the *Prosser* cases on the same date, making no distinction between matters involving trust administration, as set forth in the operative Trust Agreements, and matters related to bargainable issues, such as coverage under the collective bargaining agreements. It therefore dismissed both Trustee actions for the same failure to exhaust intracontractual mechanisms, notwithstanding the fact that the Trustees could not invoke the grievance mechanism of the collective bargaining agreement themselves and notwithstanding the fact that Prosser and Schneider were bound by the Trust Agreements which expressly provided that actions taken by the Trustees were independent of any actions

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[6] In a deposition, F. Schneider stated that a decertification election was held in August, 1979 (p. 13, ln. 25). (*See* Appellants' Brief, pp. 17-20.) The expiration date of the last contract to which Schneider was bound was February 28, 1979 (Sch. Pet. for Cert., A 73-74).

[7] Both the Joint Appendix and Prosser's Brief contain materials and arguments related to a transaction before the NLRB involving Prosser and the Union. The Trustees and the Funds were not involved in these transactions and they are not related to the *choice of forum question* at bar.

taken by the Union (Prosser's Pet. for Cert., A 41-51; Brief, pp. 6-7).[8]

Recognizing that the Trustees would be dependent on the Union to invoke the grievance clause on their behalf, and that this would be inconsistent with national pension policy and recent decisions of this Court, a panel of the court of appeals reversed (A 27-39). Following a rehearing *en banc*, the court affirmed the panel decision by a majority of 6-2 (A 2-25).

SUMMARY OF ARGUMENT

I. A. Arbitration as a federally preferred method for resolving disputes arising out of labor agreements has always been examined in the *context* in which a request for this forum has been made. Where the parties have included grievance clauses in their contracts and the alternative to arbitration was industrial strife, arbitration has been compelled even in the face of a countervailing statute. *Boys Markets, Inc.* v. *Retail Clerks Union, Local 770*, 398 U.S. 235 (1970, Norris-LaGuardia Act); *Gateway Coal Co.* v. *United Mine Workers of America*, 414 U.S. 368 (1974, *Federal Coal Mine Health and Safety Act*). Conversely, arbitration was regarded as an inappropriate forum for the ultimate vindication of individual statutory rights even though these rights paralleled those contained in a collective bargaining agreement and even where an employee had pursued his contractual claim through the grievance procedure. *Alexander* v. *Gardner-Denver, Inc.*, 415 U.S. 36 (1974, Title VII); *Barrentine* v. *Arkansas-Best Freight Systems, Inc.*, 450 U.S. 728 (1981, FLSA).

In the *context* at bar, *judicial* imposition of an arbitral forum in the absence of a contractual agreement or a statutory mandate is not appropriate. ERISA has preempted the field of pension law. Audit and collection actions are comprehended within the statute as core fiduciary obligations. Neither ERISA nor the Trust Agreements governing the Funds (mandated by the statute) contemplate the exhaustion of the grievance mechanisms of a contributing employer's collective bar-

[8] All further references to decisions of the courts below will be cited to the Prosser Appendix to its Petition for Certiorari.

gaining agreement merely because a dispute arises between the employer and the Trustees requiring its interpretation. The incorporation by reference of the Trust Agreements into the collective bargaining agreement does not transform matters of trust administration into typical "labor disputes" subject to arbitration. Moreover, in exercising *their statutory obligations*, Respondents are protecting *the statutory rights* of 500,000 Fund participants and beneficiaries, many of whom are not part of the bargaining unit and are owed no duty of fair representation by the union (e.g., retirees, dependents and their families). Thus, the role of arbitration in the context of Trustee actions to enforce claims of benefit plans requires accommodation of principles of labor and trust law in light of the identity of the parties, the issues involved, the statutory framework in which the issues have arisen, and the absence of a need to preserve industrial peace.

I. B. The principles enunciated in the *Steelworkers Trilogy* militate against imposing arbitration upon Respondents: they did not *agree* to this forum; have no *direct* access to it; and cannot derive any "therapeutic" value from the processing of patently "frivolous" claims.

Under *Steelworkers'* principles, courts would have no authority to weigh the merits of an employer's claim; hence, for practical purposes dismissal would be routine and federal courts would be ousted of the jurisdiction expressly conferred by Congress (29 U.S.C. §§ 1001(b), 1132(e), 1145). Moreover, trustees stand entirely outside of the collective bargaining process and cannot either prevent industrial strife or promote labor peace. *NLRB* v. *Amax Coal Co.*, 453 U.S. 322 (1981).

I. C. In *Lewis* v. *Benedict Coal Co.*, 361 U.S. 459 (1960), this Court determined that fund trustees are uniquely situated third-party beneficiaries. In the interests of protecting the solvency of welfare funds and the expectancies of their beneficiaries, the Court refused to apply commercial third-party beneficiary law and allow a substantive defense to be raised against the trustees which a promisor (employer) could raise in a contract action by a promisee (union). This reasoning has been and should be expanded to include the procedural defense of exhaustion. Congress intended that fund trustees

should have access to the procedural safeguards of a judicial forum as well as a forum which provides for the greatest possible consistency, finality, and review through the application of such principles as *stare decisis, res judicata,* and collateral estoppel. Congress specifically endorsed *Lewis* v. *Benedict* in enacting the Multiemployer Pension Plan Amendments Act of 1980 (Pub. L. No. 96-364); it also sought to narrow the defenses available to an employer resisting a fund collection action. *Kaiser Steel Corp.* v. *Mullins*, 455 U.S. 72 (1982), did not repudiate the principles of *Lewis;* the Court merely refused to enforce illegal contracts notwithstanding the admittedly special status of third-party beneficiary trustees.

In enacting Section 301(a) of the LMRA, Congress clearly believed that federal courts were competent to resolve disputes arising out of collective bargaining agreements. Hence, the submission of contract disputes to a federal court is not tantamount to undermining the union's status as exclusive bargaining representative or expanding the employer's obligations contrary to his intent.

II. Mandatory deferral to the grievance/arbitration procedures of a collective bargaining agreement which the Trustees *cannot invoke directly* and which require the union's efforts on their behalf vitiates the separateness between trust funds and unions mandated by Congress in enacting Section 302(c)(5) of the LMRA and the principles of nondelegability embodied in ERISA (29 U.S.C. § 1105). The union has no duty of fair representation to the Trustees and the Trustees have no statutory or contractual method of compelling the union to act on their behalf. The Eighth Circuit recognized that mandatory deferral could raise serious conflicts of interest and that unions might lack incentive to prosecute grievances benefiting retirees, particularly where this might jeopardize the jobs of active unit members. This would be particularly true if, as in the case at bar, the union was decertified. The Fifth and Third Circuits expressly endorsed this reasoning. *Bugher* v. *Consolidated X-Ray Service Corp.*, 705 F.2d 1426 (5th Cir. 1983); *Trustees of Local 478 Pension Fund, et al.* v. *Siemens*, No. 82-5719, 114 L.R.R.M. 3401 (3d Cir. Nov. 18, 1983).

III. Where Congress has addressed itself to arbitration, it has spoken directly (*see* 29 U.S.C. § 186(c)(5)(B) of the

LMRA, arbitration of trustee deadlocks; 29 U.S.C. § 1401 of ERISA, arbitration of disputes concerning employer withdrawal liability). There is nothing in the legislative history or the text of ERISA contemplating anything *but* direct access by federal fiduciaries to federal courts in enforcing claims on behalf of trust plans. The legislative history and text of MPPAA give rise to a positive inference that the arbitration of trustee collection actions was not envisioned, particularly since this would not "simplify delinquency collections" and the arbitrator would not have the authority to impose the new and mandatory statutory remedies (double interest, liquidated damages, costs and attorney fees).

IV. Employers generally report and contribute to multiemployer funds on the basis of an honor system. Respondents' audits are designed to verify the accuracy of reporting and to deter evasion. The contractual and statutory bases for the right to audit are, respectively, Article III, Section 5, sentence 2 of the Trust Agreements governing the Funds and 29 U.S.C. § 1104 of ERISA (the "prudent man" rule). The scope of an audit is not arbitrable; the employer's remedy is to seek a *judicial* review of the Trustees' demand for records and obtain a determination that it is arbitrary and capricious.

ARGUMENT

I. NEITHER NATIONAL LABOR POLICY NOR NATIONAL PENSION POLICY REQUIRES COMPULSORY ARBITRATION

I. A. Arbitration must always be considered in the context in which it is requested; mandatory deferral of trustee audit and collection actions is inimical to sound trust administration

The existence of a strong federal interest in encouraging the rapid disposition of industrial disputes through contractually agreed-upon grievance procedures is beyond question. However, the issue that was presented to the Court of Appeals for the Eighth Circuit, and is now before this Court, is whether this interest is so overriding that it requires the *judicial imposition* of an arbitral forum on the trustees of employee benefit funds without any *statutory or contractual*

basis for such compulsion and *solely* because disputes with contributing employers have arisen which require or are claimed to require the interpretation of collective bargaining agreements and hence traditional application of the "law of the shop."

The role of arbitration in the developing law of labor relations has been frequently analyzed by this Court. The fact that a particular dispute has implicated a collective bargaining agreement or required its interpretation has never been in and of itself dispositive. Rather, the Court has consistently taken pains to analyze the *context* in which a federal preference for arbitration was asserted, focusing on the specific issues involved as well as the identity of the adversaries, in light of the ultimate goal of promoting industrial peace in the given circumstances. Since arbitration is only one of a number of possible methods for resolving labor disputes, several questions have always required resolution before access to a judicial forum has been *denied*: first, have the *parties to a contract* agreed to submit *any* dispute to an arbitrator; second, have the parties agreed to submit a *particular* dispute to arbitration; third, are statutory as well as contractual rights in dispute; fourth, if statutory rights are involved, can they be adequately addressed by an arbitrator or would some other forum (such as the NLRB or a court) be better equipped to frame an appropriate remedy; fifth, is arbitration actually required to promote industrial peace.

In this regard, a few landmark decisions will be noted at the outset of this discussion to illustrate the point that arbitration as a preferred labor policy does not exist in a vacuum, is not a judicial clichē, and has not been universally mandated by this Court in situations where, despite the existence of a grievance/arbitration clause in a collective bargaining agreement, there remained a need to accommodate competing national policies reflected in statutes serving differing interests.

I. A. 1. Arbitration is preferable to industrial strife

In *Boys Markets, Inc.* v. *Retail Clerks Union, Local 770*, 398 U.S. 235 (1970), a conflict arose between policies underlying the Taft-Hartley Act (29 U.S.C. § 141, *et seq.*, 1947) and

the Norris-LaGuardia Act (29 U.S.C. § 101, *et seq.*, 1932), which required an evaluation of the competing statutes in their historical setting, judicial accommodation, and ultimate resolution in favor of arbitration. The facts were simple. Frozen food in a supermarket had been shelved by a supervisor and his crew in derogation of work reserved by the collective bargaining agreement for bargaining unit members. The union demanded that the shelves be stripped and the food replaced by them. When the employer refused to permit this, the union struck and picketed the store although the dispute was covered by a grievance/arbitration clause. The employer sought injunctive relief and specific performance of the no-strike clause in state court. The state court issued a TRO. The union removed the action to federal district court in an attempt to quash the TRO. The district court granted the employer's motion to compel arbitration and enjoin the strike and picketing, believing the issue to be arbitrable under the grievance clause and thus specifically enforceable under 301(a) of the LMRA. An appeal followed. Relying on *Sinclair Refining Co.* v. *Atkinson*, 370 U.S. 195 (1962), the Ninth Circuit reversed the district court's order on the grounds that *federal courts* (as opposed to state courts) were precluded by the Norris-LaGuardia Act from enjoining strikes and picketing arising out of a labor dispute.

This Court granted review, recognizing that its *Sinclair* ruling could lead to anomalous results. First, state courts would for all practical purposes be ousted of jurisdiction to hear actions based upon the breach of collective bargaining agreements, although Congress intended, in enacting Section 301(a) of the LMRA, that federal substantive law would be fashioned from national labor policy concurrently by state and federal courts. *Textile Workers Union* v. *Lincoln Mills*, 353 U.S. 448 (1957). Unions, however, sued by employers to enforce arbitration and no-strike agreements in *state* courts, would routinely remove the action to *federal* courts in order to gain the protection of the anti-injunction provision of the Norris-LaGuardia Act. This in turn would reduce the incentive of employers to enter into agreements containing such clauses since they could not be enforced by the most efficacious means: injunctions for their breach.

The Court therefore took *an historical look* at the relevant statutes, noting that the earlier Norris-LaGuardia Act had been passed to strengthen the ability of the then nascent labor movement to engage in legitimate concerted activity in an effort to achieve equality of bargaining power, activity which courts had previously thwarted as if in alliance with management interests. With the passage of the NLRA [Wagner] in 1935 (29 U.S.C. § 151, *et seq.*) and the LMRA [Taft-Hartley] in 1947 (29 U.S.C. § 141, *et seq.*), however, Congressional emphasis had shifted from strengthening the *economic power* of labor unions toward encouraging techniques for collective *bargaining* and the peaceful resolution of industrial disputes.

In order to promote the federal preference for arbitration as a method for resolving labor disputes (as enunciated in the *Steelworkers Trilogy*) and *also to protect state court jurisdiction for contract actions cognizable under Section 301(a) of the LMRA*, the Court overruled its Sinclair decision and declared that "the literal terms of § 4 of the Norris-LaGuardia Act *must be accommodated to the subsequently enacted provisions of 301(a) of the Labor Management Relations Act and the purposes of arbitration*" (p. 250, emphasis supplied). The holding was limited to those situations in which a dispute was covered by a *mandatory* grievance/arbitration clause *and* a traditional balancing of the equities favored granting injunctive relief to prevent irreparable harm to the employer from the effects of a continuing strike.

In *Gateway Coal Co.* v. *United Mine Workers of America*, 414 U.S. 368 (1974), a conflict arose which required this Court to resolve the issue of whether occupational safety disputes were excluded as a class from the judicial presumption in favor of arbitration as a matter of public policy. The conflict was generated by a coal mine operator's reinstatement of two foremen who had falsified certain safety records required by federal and state law. The district court enjoined the strike and ordered immediate arbitration. To assuage the union's fears regarding mine safety, the court also ordered suspension of the two foremen pending the outcome of arbitration. Notwithstanding the existence of a binding grievance/arbitration clause covering local disputes of "any kind," the Third Circuit reversed, deciding that safety disputes were qualitatively diffe-

rent from disputes over economic matters such as wages, should be treated as *sui generis*, and should not be subject to binding arbitration as a matter of public policy. Justice Douglas, in a strong dissenting opinion, stated that disputes concerning mine safety had been preempted by Congress which, in 1969, had enacted the Federal Coal Mine Health and Safety Act (30 U.S.C. § 801, *et seq.*) with a comprehensive scheme of administrative controls: "The 1969 Act specifies the arms of the law which handle these matters of safety of mines. Congress has given arbiters no share of the power" (p. 394). Nevertheless, a majority of this Court found that the Act did *not* reveal a Congressional intent to preempt all other methods of resolving any type of mine safety dispute, that Respondent itself had not made such a contention, that the company's reinstatement of two mine foremen was clearly a "local matter" and subject to the contract's grievance clause, that the union had an implied duty not to strike considering the breadth of the arbitration clause, and that the district court had correctly applied *Boys Markets*.

I. A. 2. This Court has held that arbitration is a comparatively inappropriate forum in which to vindicate statutory rights

While *Boys Markets* and *Gateway* dealt with the propriety of compelling arbitration against a statutory background addressing different, if not conflicting, purposes where the alternative was *in fact industrial strife*, two subsequent cases, *Alexander* v. *Gardner-Denver, Inc.*, 415 U.S. 36 (1974), and *Barrentine* v. *Arkansas-Best Freight Systems, Inc.*, 450 U.S. 728 (1981), rejected *the exclusivity of the arbitral forum* where an employee challenged individual statutory rights.

i. Approval of the right to vindicate Title VII claims in a federal court

In *Alexander* v. *Gardner-Denver, supra*, a black employee who had been hired initially as a low level maintenance worker and then promoted to the position of trainee drill operator was subsequently discharged for producing too many defective parts. (Although the union itself did not offer this evidence at the arbitration hearing, testimony was brought forth to the effect that white employees similarly situated were

transferred back to their original positions or otherwise disciplined but not discharged for the same offense.) The collective bargaining agreement in question prohibited discrimination along the lines of Title VII and the grievance/arbitration clause covered discriminatory discharges. However, the arbitrator was limited to interpreting the contract. The union pursued Alexander's grievance through arbitration, but the arbitrator found that he had been discharged for just cause. Prior to the arbitration award, Alexander had filed a charge of racial discrimination with the Colorado Civil Rights Commission, which referred it to the EEOC. At this time, Alexander claimed that he could not "rely" on the union. The EEOC, however, failed to find reasonable cause to believe Title VII had been violated. Nevertheless, Alexander was advised of his right to file suit in federal district court. Both the district court and the Court of Appeals for the Tenth Circuit held that since the employee had voluntarily elected to pursue his claim of racially-motivated discharge through the grievance/arbitration mechanism of the collective bargaining agreement, he was *precluded* from suing under Title VII. This Court, in a unanimous decision, reversed.

Finding issues of racial discrimination in the employment arena to be of the highest priority and analyzing the legislative history of Title VII (42 U.S.C. § 2000, *et seq.*), the Court found, *inter alia*, that Congress had given the federal courts plenary powers to enforce statutory rights; that Title VII rights were absolute and not subject to waiver or abridgement through the majoritarian principles that govern the collective bargaining process; that while the law supplemented rather than supplanted existing laws and institutions so that discrimination claims could be pursued in parallel forums (for example, in arbitration proceedings or in proceedings before the NLRB), the principles of preclusion or deferral or election of remedies were not applicable to Title VII claims; that arbitration was designed to vindicate *contractual* rather than *statutory* rights; that this arbitrator in particular was limited to interpreting the contract "in accordance with the industrial common law of the shop and the various needs and desires of the parties" (p. 53); that arbitrators have "no general authority to invoke public laws that conflict with the bargain bet-

ween the parties" (p. 53); and that arbitration, with its procedural informality, is a "comparatively inappropriate" forum in which to finally resolve individual Title VII claims (p. 56). In so concluding, the Court noted that the union has exclusive control of the manner in which a grievance is processed and that a "harmony of interest between the union and the individual cannot always be presumed, especially where a claim of racial discrimination is made" (p. 58, fn. 19).

The Court rejected the lower court's belief that granting an employee access to two forums would "sound the death knell for arbitration clauses in labor contracts" (p. 54), noting that the concomitant no-strike pledge would outweigh "whatever costs may result from according employees an arbitral remedy against discrimination in addition to their judicial remedy under Title VII" (p. 55). Indeed, both the employer and the employee might have incentive to pursue the "therapeutic" process of arbitration which could produce a satisfactory result and obviate the need for litigation. The Court concluded at pages 59-60:

> We think, therefore, that the federal policy favoring arbitration of labor disputes and the federal policy against discriminatory employment practices can best be accommodated by permitting an employee to pursue fully both his remedy under the grievance-arbitration clause of a collective bargaining agreement and his cause of action under Title VII. The federal court should consider the employee's claim *de novo*. The arbitral decision may be admitted as evidence and accorded such weight as the court deems appropriate.

ii. Approval of the right to vindicate FLSA claims in a federal court

A strikingly similar analysis was pursued in *Barrentine* v. *Arkansas-Best Freight Systems*, 450 U.S. 728 (1981), which involved a conflict between principles embodied in the LMRA and the Fair Labor Standards Act (29 U.S.C. § 201, *et seq.*). In *Barrentine*, the issue was whether time spent in pre-trip safety inspection as well as time spent driving a defective vehicle to the company's repair facility was compensable. Pursuant to the grievance clause of the contract, the

employees' union submitted the claim to the joint grievance committee for final and binding arbitration. The employees' claim was rejected. The employees then filed an action in federal district court. Count I alleged that pre-trip safety inspection and transportation time was compensable under the FLSA. Count II alleged that the union had breached its duty of fair representation by entering into a "side deal" with the employer with regard to compensation for non-trip time. The district court noted that the collective bargaining agreement, if read literally, *would* require compensation for the time claimed. Admitting the probable existence of a side agreement, the court found no breach of the duty of fair representation. The court also refused to address the merits of the employees' FLSA claim. The Court of Appeals for the Eighth Circuit affirmed, adding that since national labor policy encourages the arbitration of labor disputes, wage disputes arising under the FLSA could also be the subject of binding arbitration if the collective bargaining agreement so provided. This Court reversed, holding that an arbitrator's ruling would not bar an employee from seeking judicial review of his *statutory* claim on the merits whether or not it had been previously submitted to an arbitrator.

The FLSA is analogous to ERISA in that both are remedial statutes designed to protect *individual* employees' rights with respect to the basic terms and conditions of employment, including entitlement to wages and fringe benefits. Thus, this Court's analysis of the tension between the LMRA and the FLSA is applicable to the tension that exists between the LMRA and ERISA in the case at bar, notwithstanding it is the Trustees who are claiming *statutory* rights on behalf of participants.

The Court first noted that the LMRA protects *collective* interests while the FLSA protects individual rights: "A tension arises between these policies when the parties to a collective-bargaining agreement make an employee's entitlement to substantive statutory rights subject to contractual dispute-resolution procedures" (p. 735). Thus, not "all disputes between an employee and his employer are suited for binding resolution in accordance with procedures established by collective bargaining," certainly not those concerning

"rights arising out of a statute designed to provide minimum substantive guarantees to individual workers" (p. 737) even though such rights had a parallel basis in the collective bargaining agreement. Moreover, the FLSA "grants individual employees broad access to the courts," "no exhaustion requirement or other procedural barriers are set up, and no other forum for the enforcement of statutory rights is referred to or created by the statute" (p. 740). The Court thus stated that "FLSA rights cannot be abridged by contract or otherwise waived because this would 'nullify the purposes' of the statute and thwart the legislative policies it was designed to effectuate."

The Court also cited a number of reasons why an employee's rights under the FLSA might be lost if submission to arbitration precluded him from later bringing suit in federal court. The Court noted that:

> . . . since a union's object is to maximize overall compensation of its members [and not] to ensure that each employee receives the best compensation deal available, a union balancing individual and collective interests might validly permit some employees' statutorily granted wage and hour benefits to be sacrificed if an alternative expenditure of resources would result in increased benefits for workers in the bargaining unit as a whole (p. 742).

The Court also pointed out that arbitrators are primarily competent with regard to the "law of the shop not the law of the land" and "may not be conversant with the public law considerations underlying the FLSA" (p. 743). Because the arbitrator is required to effectuate the intent of the parties rather than to enforce the statute, he may issue a ruling that is inimical to the public policies underlying the FLSA, thus depriving an employee of protected statutory rights" (p. 744). He may also be precluded by the contract from affording the employee the full panoply of remedies provided by the statute (p. 745). Therefore, "even when the union has fairly and fully presented the employee's wage claim, the employee's statutory rights might still not be adequately protected" (p. 743). ***In other words, neither arbitration nor the duty of fair representation affords an adequate safeguard where an individual's nonwaivable statutory rights are concerned.***

I. A. 3. Mandatory deferral of Trustee audit and collection actions is inappropriate based on the principles set forth above

In the case at bar, mandatory deferral of audit and collection actions to grievance procedures that the Trustees cannot themselves invoke is inappropriate for many reasons: most importantly, *because* of the size of the Central States Funds, the multitude and disparity of applicable grievance clauses, and the need for centralized trust administration; *because* many of the Trusts' participants and beneficiaries are no longer members of a bargaining unit and hence not subject to the *union's duty of fair representation* but only to the *Trustees' fiduciary obligations*; *because* ERISA has preempted the field of employee benefits and has not provided for arbitration in its enforcement scheme; and *because* mandatory deferral would vitiate the separateness between unions and trust funds, oust federal courts of jurisdiction, and preclude awards of statutory remedies as intended by Congress.

Respondents are Trustees of two of the largest Taft-Hartley employee benefit funds in the United States. Some 12,000 employers in at least 40 states contribute to these funds pursuant to thousands of collective bargaining agreements with local Teamster unions, many having different grievance/arbitration mechanisms for the resolution of disputes between the union and the company or between individual employees and the company. These mechanisms range from single outside arbitrators to joint management-union committees. Prior to 1982, not a *single* one of these contracts specified the grievance of disputes between employers and the Funds or their Trustees.[9] Indeed, until the Seventh Circuit ruled otherwise in *Central States, Southeast and Southwest Areas Pension Fund* v. *Howard Martin*, 625 F.2d 171 (7th Cir. 1980), it was assumed that *Congress* did not contemplate or require benefit fund *trustees* to exhaust the intracontractual mechanisms of an *individual employer's* collective bargaining agreement, but could pursue their claims in federal court

[9] In 1982, the National Master Freight Agreement, to which Howard Martin (not Prosser or Schneider) was a signatory, was amended to expressly provide the Trustees with direct access to its grievance procedures.

either under Section 301(a) of the LMRA and/or Section 502 of ERISA. Hence, the issue of *mandatory deferral* is one of recent vintage. (*See* Trustees' Consolidated Brief in Opposition to Writs of Certiorari and the cases cited therein, p. 6). Because of the *disparity* of operative grievance/arbitration clauses as well as the Trustees' lack of *direct access* to them, *mandatory deferral* is inimical to uniform trust administration.

Respondents serve the interests of some 500,000 participants and beneficiaries. Some of them are active workers and union members. Union membership, however, is not a prerequisite for contributions and ERISA benefits. Particularly in "right to work" states, many participants are not union members. Nevertheless, they are engaged in covered employment under operative collective bargaining agreements and are entitled to contributions from their employers and fair representation by their unions. Yet a third group of participants and beneficiaries are *retirees* and their families. As the Court of Appeals for the Eighth Circuit noted, this group stands outside of the bargaining unit, has no voice in union affairs, and is not subject to the union's affirmative duty of fair representation (A-14, 17). This group must *rely entirely* on the vigilant and vigorous activity of the Fund Trustees for the protection of their retirement income and health benefits. *See also Lewis* v. *Benedict Coal Co.*, 361 U.S. 459 (1960), and *Allied Chemical and Alkali Workers of America, Local 1* v. *Pittsburgh Plate Glass*, 404 U.S. 157 (1971).

Mandatory deferral and forced reliance on unions to invoke the contract's grievance procedures, as required by the Seventh Circuit in *Howard Martin* and advocated by Petitioners here, would not necessarily serve the interests of non-union members and retirees and their dependents, as the Eighth Circuit observed. As this Court noted in *Alexander* v. *Gardner-Denver* and *Barrentine* v. *Arkansas-Best Freight Systems, supra*, a harmony of interest between unions and individual employees cannot always be presumed. This is particularly true in the case of retirees and non-members, not to mention the Trustees as to whom the law affirmatively *precludes* a duty of fair representation.

Because the Central States Funds, like all multiemployer employee benefit plans, pool the contributions received from all employers and determine their funding and benefit policies in accordance with actuarial assumptions taking into account the entire contribution base, any claim or action against an individual employer affects the fiscal integrity and actuarial solvency of the entire Fund. While a dispute may appear "local" as to that particular employer, and hence amenable to its particular grievance procedure, it is "national in character" from the perspective of the Funds as a whole and the participants and beneficiaries they serve. In contrast to the local mine safety dispute found arbitrable in *Gateway Coal*, ERISA has preempted the field of employee benefits and *mandatory deferral* has no place in its enforcement scheme notwithstanding an employer raises a "coverage" dispute as a defense to a collection action. This is particularly true since the Trustees' refusal to arbitrate the dispute would neither promote nor disrupt labor peace. (As will be discussed below, audits are internal Fund activities, subject to the exclusive and discretionary judgment of the Trustees. *Mandatory deferral* of this dispute is particularly inappropriate.)

While the Central States Funds (like most multiemployer employee benefit trusts) were established and structured in accordance with Section 302(c)(5) of the LMRA, they are administered by Trustees whose rights and obligations are subject almost exclusively to the prescriptions of ERISA: their powers and duties *must* be set forth in a written trust agreement (29 U.S.C. § 1102); they *must* comply with *statutory fiduciary* standards (29 U.S.C. §§ 1001, 1104); they *must* refrain from engaging in specified *prohibited transactions* (29 U.S.C. § 1106), the breach of which exposes them to personal liability (29 U.S.C. § 1109); they may *not delegate* basic trustee responsibilities unless specifically authorized by the statute (29 U.S.C. § 1105); they *must* see to it that benefit plans comply with ERISA's rules on funding, vesting, participation, recordkeeping, and disclosure (29 U.S.C. §§ 1022-1059) (*See* App. B).

The fact that many of the Trustees' ERISA rights and obligations have been memorialized in Trust Agreements

which in turn have been incorporated by reference into collective bargaining agreements between employers and unions does not transform these statutory powers and responsibilities into contractual terms subject to *mandatory deferral* if a dispute arises with regard to matters of trust administration (of which collections and audits form a basic part. *See* DOL and IRS Reg. 76-1, March 26, 1976, 41 F.R. 12740).[10] Indeed, it is well-established that trust law rather than labor law principles inform the statutory scheme; that the funds and unions are and must be entirely separate entities; and that fund trustees stand completely outside of the collective bargaining process. *Lewis* v. *Benedict Coal Co.*, 361 U.S. 459 (1960); *NLRB* v. *Amax Coal Co.*, 453 U.S. 322 (1981); *United Mine Workers of America Health and Retirement Funds* v. *Robinson*, 455 U.S. 562 (1982); *see also Sinai Hospital* v. *National Benefit Fund for Hospital & Health Care Employees*, 697 F.2d 562 (4th Cir. 1982). Compulsory arbitration has never formed part of the law of trusts.

Arbitration is not provided for either in the Trust Agreements governing the Central States Funds or in ERISA. Rather, direct access to a judicial forum was specified both by the drafters of the trust's governing documents (Article III, Section 4, J.A. p. 22) as well as by Congress in 1974 (29 U.S.C. §§ 1001(b), 1132(e)). In 1980, Congress amended ERISA and created a *new* and *distinct* cause of action for the collection of delinquent contributions, affording plans far more liberal (and mandatory) *statutory* remedies if their *litigation* efforts proved successful (29 U.S.C. §§ 1145, 1132(g)(2)) (App. B). Among these remedies are costs, liquidated damages, and reasonable attorney's fees which would not, of course, be available to unions if they chose to engage in collection actions through *arbitration* on behalf of the funds.

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[10] This regulation created a class exemption permitting fund trustees to compromise or settle delinquency claims in accordance with the "prudent man" rule of ERISA. However, the regulation presupposes vigorous, orderly and systematic procedures for collecting delinquent contributions in the normal situation, indicating that failure to implement them would be a prohibited transaction. Comments prefacing the Regulation note with approval the field audit programs of multiemployer funds.

As was the case in *Boys Markets, supra*, a hallowed institution—here, the grievance/arbitration of controversies arising out of collective bargaining agreements in accordance with 203(d) of the LMRA—will require *reexamination and accommodation in light of the goals of subsequently enacted pension law*, ERISA and MPPAA, particularly in view of the fact that *mandatory deferral* could have the practical effect of *ousting federal courts of jurisdiction* over trustee collection actions even though there is no countervailing necessity to preserve industrial peace. Contrary to the assertion of the Seventh Circuit in *Howard Martin*, "simple" collection actions rarely exist, and any *claimed* contractual dispute would enable an employer to have the trustees' action dismissed.[11] As in *Barrentine* v. *Arkansas-Best Freight Systems* and *Alexander* v. *Gardner-Denver*, the Court will be asked to consider whether an arbitrator can provide benefit plans with the remedies intended by Congress and whether unions can be safely relied upon to overcome the inherent conflicts of interest suggested by the Eighth, Fifth, and Third Circuits; or whether mandatory deferral of trustee actions to procedures that can be invoked only by the union will vitiate the separateness between trust funds and unions and the principles of nondelegability mandated by Congress.

In sum, with all due respect to the authors of the dissenting opinion in the Eighth Circuit, the mere fact that Petitioners have alleged that resolution of the Trustees' audit and collection actions requires interpretation of the collective bargaining agreement does not *ipso facto* convert these actions from basic matters of trust administration into traditional collective bargaining disputes subject to arbitration, no less to *compulsory* arbitration through procedures the Trustees cannot themselves invoke. As the four decisions set forth above suggest, each of whose rationale has an important application to the case at bar, a thorough process of balancing and accommodation is required to resolve the role of arbitration in the context

[11] *See United Steelworkers of America* v. *American Manufacturing Co.*, 363 U.S. 564, 568 (1960), in which the majority held that courts had no authority to weigh the merits of a dispute which, on its face, was covered by the grievance clause of the collective bargaining agreement.

of ERISA controversies. It is simply not sufficient to assert, as Petitioners have done, that a federal presumption exists in favor of arbitration. The law did not stop short twenty-four years ago with the *Steelworkers Trilogy* and interpretation of collective bargaining agreements by federal judges[12] does *not* presuppose that courts will renegotiate or rewrite these agreements in derogation of an employer's intended obligations.

I.B. Fund trustees are not parties to collective bargaining agreements and are therefore not required to submit their disputes with contributing employers to the grievance/arbitration mechanisms set forth therein

Federal policy in favor of arbitration derives in the first instance from a *specific Congressional enactment*: Section 203(d) of the LMRA provides: "Final adjustment by a *method agreed upon by the parties* is hereby declared to be the *desirable* method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement" (29 U.S.C. § 173(d) emphasis supplied). While 203(d) has been construed to mean that Congress specifically endorsed the inclusion of grievance/arbitration procedures in collective bargaining agreements,[13] the statute itself merely emphasizes that the parties to such contracts should come to *private agreements* as to how best to resolve their disputes and that outside intervention should be as limited as possible. It is clear that Section 203(d) of the LMRA regards arbitration as a *purely consensual* matter.

Federal preference for arbitration as a matter of national labor policy was given both practical meaning and presumptive force thirteen years later in the celebrated *Steelworkers Trilogy: United Steelworkers of America* v. *American Man-*

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[12] Considering the fact that multiemployer plans have been expressly conceived as *trusts* and that the relief contemplated by ERISA is essentially equitable in nature, collection actions are *rarely* heard by juries unless an ancillary legal issue is involved such as the validity of a promissory note. The normal collection action is basically an action for the specific performance of a contractual obligation. (*See*, App.. B, 29 U.S.C. 1103)

[13] *See United Steelworkers of America* v. *American Manufacturing Co.*, 363 U.S. 564, 566 (1960).

ufacturing Co., 363 U.S. 564 (1960); *United Steelworkers of America* v. *Warrior and Gulf Navigation Co.*, 363 U.S. 574 (1960), and *United Steelworkers of America* v. *Enterprise Wheel and Car Corp.*, 363 U.S. 593 (1960).

As opposed to arbitration in the commercial context which provided an alternative to litigation over specific matters where the working relationship between the contracting parties had already broken down and a decision in favor of one of them was required, labor arbitration was conceived as a *dynamic, ongoing* part of the *collective bargaining process itself* (pp. 580-581). Grievance/arbitration was designed to give "meaning and content" to labor agreements which, unlike the ordinary commercial contract, were *not* limited to specific matters but covered the entire employment relationship and could not possibly comprehend the "myriad" of problems likely to arise in an industrial setting (pp. 578-580). Because such unforeseen problems required both flexible and expeditious resolution, great emphasis was placed on the special expertise of the labor arbitrator who was expected to develop, become familiar with, and apply "the common law of the industrial shop" in accordance with the "variant needs and desires of the parties" (pp. 581-582).

The Court left no doubt, however, that the *primary* goal of grievance/arbitration was the promotion of industrial peace. Hence, the Court concluded that unless a particular dispute was *expressly excluded* from the grievance clause of a collective bargaining agreement, it should be *presumed* arbitrable (pp. 581, 583-585). In contrast to prior decisions, in which the Court refused to find an *implied intent* to submit a dispute to arbitration but required the parties to manifest such an intent in *clear and plain language* (pp. 585-587, 589, dissenting opinion of Justice Whittaker), the Court now decided that in labor disputes the judicial inquiry should be limited to searching only for an explicit provision that would bring the particular controversy under the *exclusion* clause (if any), all other doubts *being resolved in favor of coverage* (p. 583). Moreover, courts would have no authority to weigh the grievance on its merits and decline to compel arbitration even if the claim was "*frivolous*". The Court thought that the processing "of even

frivolous claims" might have "a therapeutic value" which might not be appreciated by those (such as judges) who were not part of "the plant environment" (p. 568). Finally, if the arbitration award drew its essence from the collective bargaining agreement, courts were required to honor it regardless of whether or not they would have come to a similar conclusion; in other words, judicial review of arbitration awards was intended to be *extremely* limited (pp. 597-599).

The Court's departure from traditional contract law, its creation of a presumption in favor of arbitration, and its espousal of limited judicial review were justified by the very *practical* fact that grievance/arbitration clauses were normally accompanied by a no-strike provision. Since the union's express or implied pledge to refrain from work stoppages as well as the employer's agreement to submit disputes to grievance/arbitration were specifically enforceable under Section 301(a) of the LMRA, both in federal and state courts, the ultimate result of giving the most liberal effect to grievance/arbitration clauses could indeed be the widespread elimination of work stoppages and other forms of economic warfare impeding the free flow of commerce. Limited judicial review was, of course, necessary not so much to *liberate courts* from the task of interpreting labor contracts as to *provide incentive to the bargaining parties to negotiate* grievance/arbitration clauses. Obviously, if courts could overturn arbitrators' awards and review contractual disputes *de novo* a bargain for the arbitrator's judgment would be illusory and unions would have little reason to withhold the use of their economic weapons which are often the only efficacious ones!

The *presupposition* for the presumption in favor of arbitration and the limited role of courts in the resolution of labor conflicts covered by grievance/arbitration clauses is that *parties to a collective bargaining agreement* have *expressly agreed* to submit at least some of their contractual disputes to this forum. As Justice Brennan noted in his concurring opinion in *American Manufacturing*, arbitration is fundamentally a "creature of contract" (p. 570). Indeed, the contractual basis of arbitration is one of the main threads that links the three cases of the *Trilogy* together. Thus, while the presumption

itself was first articulated in *Warrior and Gulf*, the Court even there cautioned that "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit" (p. 582). Hence, "judicial inquiry under Section 301 must be strictly confined to the question of whether the reluctant party did agree to arbitrate the grievance or did agree to give the arbitrator the power to make the award he made" (*id.*). Arbitrators, after all, are specifically *selected by the parties* because of *their* "confidence in his knowledge of the common law of the shop and *their trust* in his *personal judgment* to bring to bear considerations which are not expressed in the contract as criteria for judgment. . . . For the *parties'* objective in using the arbitration process is *primarily to further their common* goal of uninterrupted production under the agreement, *to make the agreement serve their specialized needs*" (*id.*, emphasis supplied). It is this very reasoning that prompted the Court to require a strict hands-off attitude in reviewing the merits of arbitration awards. As noted in *Enterprise Wheel and Car Corp.*, to the extent a party has *agreed* to submit disputes to arbitration, "it is the arbitrator's construction which was bargained for" (p. 599).

In *Atkinson* v. *Sinclair Refining Co.*, 370 U.S. 238 (1962), the Court applied *Steelworkers* principles in a 301 action brought by a company for an injunction and damages in connection with the breach of a no-strike clause. The act that precipitated the allegedly unlawful strike was the company's docking of three employees a total of $2.19, which pay claims were concededly subject to the grievance clause of the collective bargaining agreement. In an analysis strikingly pertinent to the case at bar, Justice White determined, by scanning the entire contract, that the *company's damages* claim, unlike the *employees' pay claims*, was *not* subject to the grievance/arbitration clause. In fact, the Court found that the grievance/arbitration clause standing by itself was dispositive because it expressly precluded arbitration boards from considering *any* matters *other than employee grievances*. The contract did not merely set forth specific procedures to be followed by employees or workmen's committees, it expressly provided that:

> . . . local arbitration boards "shall consider only individual or local employee or local committee grievances arising under the application of the currently existing agreement." *There is not a word in the grievance and arbitration article providing for the submission of grievances by the company*. Instead, there is the express, flat limitation that arbitration boards should consider only employee grievances. Furthermore, the article expressly provides that arbitration *may be invoked only at the option of the union. At no place in the contract does the union agree to arbitrate at the behest of the company. The company is to take its claims elsewhere, which it has now done*. (p. 243, emphasis supplied)

The lower courts' denial of the union's motion to dismiss the damages claim for exhaustion was affirmed.

The imposition of a contract provision on a nonconsenting party is a derogation of basic contract principles, including the freedom *not* to contract. It is nevertheless true that the arbitration clause of a collective bargaining agreement has been imposed on nonsignatories in two specific situations, the first involving successor corporations (*see John Wiley & Sons* v. *Livingston*, 376 U.S. 543 (1964)) and the second involving individual employees in a bargaining unit (*see Republic Steel Corp.* v. *Maddox*, 379 U.S. 650 (1965); *Vaca* v. *Sipes*, 386 U.S. 171 (1967)). The factual and policy considerations that underlie cases such as these differ substantially from those at issue here.

In the case of a successor corporation, the predecessor has often ceased to exist so that the grievant would have no remedy if arbitration were not imposed. As the Court noted in *Wiley*, employees have little if any voice in corporate mergers or other forms of structural transformation and thus require some protection against sudden changes in the terms and conditions of their employment. Even here, however, the Court did not suggest that arbitration of every kind of grievance would be unconditionally required. (Similar principles

require the arbitration of some disputes after a union has been decertified and/or the contract has expired.)[14]

Employees in an existing bargaining unit, in contrast, have voluntarily relinquished a substantial number of individual (non-statutory) rights by selecting a union as their exclusive bargaining representative and by ratifying the resulting collectively negotiated agreement. While such employees are not formally "parties" to the contract (since they are not signatories thereto) they are certainly quasi-parties in substance. As to them, the grievance/arbitration mechanism is no different from the other negotiated terms and conditions of employment and must be exhausted where a covered dispute arises. Any other approach would undermine the statutory doctrine of exclusive representation and the whole process of *collective* bargaining.[15] Practical considerations also dictate that individual employees should not routinely bypass intracontractual procedures; in terms of sheer numbers, a liberal approach to contract circumvention would impose impossible burdens on courts. In any event, these two exceptions do not weaken the *absolute* nature of the party requirement enunciated in the *Steelworkers Trilogy*.

Applying the above principles to the present appeal, it is clear that the Eighth Circuit was correct in holding that Respondents were not contractually required to submit their disputes with Petitioners to the grievance mechanisms of the collective bargaining agreement as a condition precedent to filing suit in federal court.

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[14] *See*, for example, *Nolde Bros., Inc.* v. *Local No. 358, Bakery & Confectionery Workers Union, AFL-CIO*, 430 U.S. 243 (1977); *United States Gypsum Co.* v. *United Steelworkers of America*, 384 F.2d 38 (5th Cir. 1967, *cert. denied*, 389 U.S. 1042.

[15] Petitioners focus heavily on the union's exclusive duty to represent employees. This doctrine, embodied in Section 9(a) of the LMRA (29 U.S.C. § 159(a)) has nothing to do with the issue at bar. The Trustees are not "bargaining" on behalf of employees by seeking a federal court's *interpretation* of disputed terms of a *negotiated* collective bargaining agreement. Schneider's argument that the Eighth Circuit's opinion will "undermine" the union's status as "the statutory exclusive bargaining representative of an employer's employees" (p. 15) has no merit.

First, there is no provision in ERISA similar to Section 203(d) of the LMRA encouraging *trustees* to enter into *private agreements* to resolve disputes with contributing employers outside the context of a federal court with its procedural safeguards. (ERISA requires only *benefit claimants* to exhaust a *plan's* review and appeals procedure before filing suit under Section 502.)[16]

Second, trustees are third-party beneficiaries of collective bargaining agreements, not parties to them. Respondents *did not agree* to substitute the judgment of an arbitrator for that of a federal court. Moreover, the Trust Agreements governing the Funds *expressly authorize judicial proceedings* (Article III, Section 4, J.A. 22). Although Article III, Section 1 clearly states that an employer's contribution obligations depend on the terms of a collective bargaining agreement, the Trust Agreements nowhere provide for the deferral of Trustee collection claims to the arbitration mechanisms of that agreement if a dispute over particular terms arises with an employer. Indeed, Article III, Section 4 expressly states that the Trustees and the union are to act separately and independently in enforcing contribution obligations without prejudice to the legal rights of either. The Trustees *have* no arbitration rights under the labor agreements (J.A. 55-57, 76-79).

Disputes concerning the interpretation of the Trust Agreements themselves must be submitted to the Trustees who alone have the authority to make final and binding resolutions (Article IV, Section 17, J.A. 26-27). Such interpretations must be enforced by courts unless the person challenging the Trustees' construction can prove that it was arbitrary and capricious. See *Riley* v. *MEBA Pension Trust*, 570 F.2d 406 (2d Cir. 1977). The Trustees' contractual right to conduct audits is controlled by Article III, Section 5 of the Trust Agreements.

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[16] Prosser's argument (p. 42) that the right of the Trustees to sue on behalf of participants and beneficiaries is no greater than the rights of these persons to sue on their own behalf has no merit. Every collection action brought by the Trustees against a contributing employer is brought on behalf of the Funds' *entire constituency*, not solely on behalf of that employer's covered employees. This distinction will be discussed further in Section III of this Argument.

Hence Prosser's remedy was not to seek arbitration of the permissible scope of the audit but to seek a declaration from the court as to the reasonableness of the Trustees' demand for the production of records.

Third, the grievance clause of Petitioners' collective bargaining agreements from 1970 through 1982 encompassed *only* disputes "between the Company and the Union or any employee of the Company as to the meaning or application of the provisions of this Agreement" (J.A. 55). Moreover, disputes regarding the failure to contribute to the Health and Welfare and Pension Funds was excluded from this clause as well as from the union's no-strike obligation, *infra*, p. 3, fn. 5.[17] Under the rationale in *Atkinson* v. *Sinclair Refining Co.*, *supra*, there is certainly "forceful evidence" that the parties to the collective bargaining agreement *did not intend* that disputes between Prosser, Schneider, and *the Trustees* concerning audits or collections should be deferred to the grievance mechanisms of the contract, as the court of appeals correctly found.

Finally, deferral is not required as a matter of national *labor* policy in order to promote industrial peace and to facilitate an ongoing process of collective bargaining. As this Court unequivocally decided in *NLRB* v. *Amax Coal Co.*, 453 U.S. 322 (1981), benefit fund trustees are neutral fiduciaries who owe uncompromising loyalty *only* to fund participants and beneficiaries. *See*, Prosser Br. p. 16) They may not advance the interests and are not the representatives of the labor and management groups appointing them for the purposes of collective bargaining and the adjustment of grievances. Since they stand entirely outside of the collective bargaining *process*, they can neither precipitate nor prevent industrial strife.

Both the Fifth and the Third Circuits have endorsed the Eighth Circuit's analysis. *Bugher* v. *Consolidated X-Ray Service Corp.*, 705 F.2d 1426 (5th Cir. 1983); *Trustees of the Local 478 Trucking and Allied Industries Pension Fund, and*

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[17] In this regard, all of the collective bargaining agreements from 1970-1982 are substantially the same.

the Joint Welfare Fund of Employers and Local 478, International Brotherhood of Teamsters v. *Siemens Corp.*, No. 82-5719 (3d Cir. Nov. 18, 1983), 114 L.R.R.M. 3401.

I.C. The Eighth Circuit was correct in suggesting that this Court's decision in *Lewis* v. *Benedict* encompassed procedural as well as substantive defenses to actions brought by Fund trustees against recalcitrant contributing employers

I.C.1. Collective bargaining agreements are not typical third-party beneficiary contracts and the trustees of employee benefit funds are uniquely-situated third-party beneficiaries

Petitioners, relying on commercial third-party beneficiary law and the Seventh Circuit's reasoning in *Central States* v. *Howard Martin*, 625 F. 2d 171 (7th Cir. 1980), argue that the party requirement is not dispositive since the trustees are *third-party beneficiaries* and as such can have no greater rights than those of the *parties* to the contract. Since *parties* to a collective bargaining agreement having a grievance/arbitration clause covering a particular dispute cannot proceed to court without first exhausting their intracontractual remedies, the *third-party beneficiary* trustees should be subject to the same condition precedent before litigation is permitted. In so reasoning, Petitioners (and the Seventh Circuit) have given this Court's decision in *Lewis* v. *Benedict Coal Co.*, 361 U.S. 459 (1960), a very *narrow* reading, a reading that is limited to the specific facts of the case and the specific substantive defense of set-off raised against the trustees, thereby *completely ignoring* the policy principles that led the Court to *depart* in a *most decisive manner* from the law of commercial contracts. The Eighth Circuit, like the Third Circuit in *Trustees of the Local 478 Pension Fund, et al.* v. *Siemens, supra*, as well as numerous district courts, chose to give this seminal case a more liberal interpretation.[18] In the interest of protecting the solvency of employee benefit funds and their beneficiaries, the approach taken by these courts

[18] *See* Respondents' Brief in Opposition to Petitions for Writs of Certiorari, p. 6, and the cases cited therein.

should be regarded as correct. As the Third Circuit noted in *Siemens, supra*: "The relevant national policy is the preservation of the independence and integrity of pension funds in order to protect the security of retired workers and their families." (114 L.R.R.M. 3404.)

In *Lewis* v. *Benedict, supra*, the trustees of the United Mine Workers Welfare and Retirement Fund sought to collect royalties from a coal operator based on the amount of coal produced in accordance with the terms of the collective bargaining agreement. The company conceded that it owed the money but claimed that its performance to the Fund was excused because the union had engaged in a work stoppage in violation of the contract's no-strike clause. The district court found for the trustees but allowed the employer a set-off in lieu of strike damages. The Court of Appeals for the Sixth Circuit affirmed. The issue as framed by this Court was: "whether the lower courts were correct in holding in effect that Benedict might assert the union's breaches as a defense to the trustee's suit, for to the extent Benedict (the promisor) does not collect from the union (the promisee), the union's liability is set off against Benedict's liability to the third-party beneficiary" (p. 464). Rejecting a mechanical application of traditional third-party beneficiary law, the court immediately responded to the issue by stating: "The answer to that question requires, we think, our consideration of the nature of the interests of the union, the company, and the trustees in the fund under the collective bargaining agreement" (p. 464). In finding for the trustees and reversing the decisions of the lower courts, Justice Brennan, speaking for the majority, noted that collective bargaining agreements were *not* typical third-party beneficiary contracts (p. 468); that the employer's interest in the third-party beneficiary fund transcended both the life of the existing contract and the mere payment of royalties (p. 468); that the employer's interest in the *solvency* of the fund should be as great as that of the union since the very existence of the fund removed from its own shoulders the burden of establishing and administering a benefit plan for its own employees which had become commonplace in modern industrial practice (pp. 468-469); that unlike the usual third-

party beneficiary contract, the collective bargaining agreement here was an industry-wide contract affecting many employers and participants (p. 469); thus, the practice of allowing set-offs because of a particular union's particular contract breach would have the ultimate effect of diminishing fund assets which would adversely affect both innocent employees whose benefits might be reduced and other contributing employers who might be forced to contribute higher royalties to make up for deficiencies caused by set-offs (p. 469).

The court also noted that allowing such a defense would unfairly affect the interests of *fund participants and beneficiaries who might already be retired or who might be dependents and hence without any direct voice in union affairs* (p. 470). Moreover, the court noted that the employer's *contractual obligation* to pay royalties was an *independent promise* based solely on the amount of coal produced and was not in any way *contingent* upon the union's performance of any of its promises in the contract (pp. 465-466). In fact, the court treated the employer's promise to pay *benefits* as analogous to its independent promises to pay *wages* to each individual in its employ covered by the collective bargaining agreement, which wages would assuredly not be subject to a set-off on account of unlawful union conduct (pp. 469-470). For all of the above reasons, but particularly in its desire to protect the solvency of employee benefit funds and hence the welfare of their beneficiaries, the Court held that "the parties to a collective bargaining agreement must express their meaning in unequivocal words before they can be said to have agreed that the union's breaches of its promises should give rise to a defense against the duty assumed by an employer to contribute to a welfare fund meeting the requirements of 302(c)(5)" (p. 470).

The Court, which decided *Lewis* v. *Benedict* in February, 1960, drew many of its policy considerations from Section 302(c)(5) of the LMRA which, like ERISA and MPPAA after it, was designed to afford certain protections to benefit fund participants and beneficiaries. The decision was expressly

endorsed by Congress twenty years later. In a speech to the House of Representatives on August 25, 1980, just prior to passage of MPPAA, Rep. F. Thompson, one of the bill's major sponsors, asserted on behalf of himself and others who drafted the legislation:

> Recourse available under current law for collecting delinquent contributions is insufficient and unnecessarily cumbersome and costly. Some simple collection actions brought by plan trustees have been converted into lengthy, costly, and complex litigation concerning claims and defenses unrelated to the employer's promise and the plan's entitlement to the contributions. This should not be the case. *Federal pension law must permit trustees of plans to recover delinquent contributions efficaciously, and without regard to issues which might arise under labor-management relations law–other than 29 U.S.C. 186.* Sound national pension policy demands that employers who enter into agreements providing for pension contributions not be permitted to repudiate their pension promises.
>
> In this regard we endorse judicial decisions such as *Lewis* v. *Benedict Coal Corp.*, 361 U.S. 459 (1960); *Lewis* v. *Mill Ridge Coals, Inc.*, 298 F.2d 552 (6th Cir. 1962); and *Huge* v. *Long Hauling Company, Inc.*, 590 F.2d 457 (3rd Cir. 1978). *Cases such as Western Washington Laborers/Employers Health and Security Trust Fund* v. *McDowell*, —— F. Supp. ——, 103 L.R.R.M. 2219 (W.D. Wash. 1979) and *Washington Area Carpenters Welfare Fund, et al.* v. *Overhead Door Company*, C.A. No. 79-0097, USDC D.C. April 22, 1980, are considered to have been incorrectly decided and this legislation is intended to clarify the law in this respect *by providing a direct, unambiguous ERISA cause of action to a plan against a delinquent employer.* 126 Cong. Rec. (House) 23039 (August 25, 1980).

The only defenses Rep. Thompson would have permitted appear to be those based on the absence of a predicate agreement between an employer and a labor organization, the non-exclusive deployment of fund assets for employees and their dependents, or structural defects in the trust, e.g., viola-

tions of the requirements of Section 302 of the LMRA which must be met if contributions are to be deemed lawful and if the trust is to preserve its tax exempt status. (Interestingly enough, the Court of Appeals for the District of Columbia recently held that absent proof of union domination even the structural defect of unequal representation of labor and management trustees would not excuse an employer's contractual obligation to contribute to the benefit fund in question. *See National Stabilization Agreement* v. *Commercial Roofing & Sheet Metal*, 655 F.2d 1218 (D.C. Cir. 1981).

Clearly, Congress intended to *substantially narrow* the range of defenses available to an employer in collection actions brought by fund trustees in the interests of promoting the fiscal health of these trusts and the expectations of their beneficiaries. Thus, the policy considerations that led this Court to state in 1960 that collective bargaining agreements are not typical third-party beneficiary contracts and that trustees are not typical third-party beneficiaries have gained *added* strength and support from the passage of ERISA in 1974 and MPPAA in 1980. Indeed, this Court has continued to respond with great sensitivity to the needs both of fund beneficiaries and of funds themselves in three recent landmark decisions: *Nachman Corp.* v. *PBGC*, 446 U.S. 359 (1980), in which the Court found that certain provisions of ERISA could supersede exculpatory clauses in employers' trust agreements limiting their funding obligation and the payments of promised benefits to the assets of the plan at the time of termination; *NLRB* v. *Amax Coal Co.*, 453 U.S. 322 (1981), in which the Court held that it was not an unfair labor practice for a union to strike an employer in support of its demand for participation in an already existing national pension and welfare fund which offered greater portability and benefits to covered employees than would the single-employer plan proposed by *Amax* as an alternative during collective bargaining negotiations; *Jim McNeff* v. *Todd*, 103 S. Ct. 1753 (1983), in which the Court held that an employer's obligation to contribute to certain fringe benefit funds was enforceable under prehire contracts permitted in the construction industry without proof of the union's majority status and until such time as the contract was *overtly* repudiated.

Fully aware of Congress's desire to improve the financial health of multiemployer funds by creating both a new cause of action for delinquent contributions and by imposing harsh sanctions against employers who breached their contractual obligations (Sections 306(a) and (b) of MPPAA, 29 U.S.C. §§ 1145, 1132(g)(2)), this Court had an opportunity to reexamine the third-party status of fund trustees in *Kaiser Steel Corp.* v. *Mullins*, 455 U.S. 72 (1982), and to overrule *Lewis* v. *Benedict* upon reconsideration of the issues involved. It did not do so.

In *Kaiser Steel*, the issue was whether the trustees of the United Mine Workers Health and Retirement Funds could enforce Kaiser's purported contractual obligation to contribute royalties based on coal it *purchased for use or sale* from *non-signatory coal producers* whose employees were not represented by the United Mine Workers and who had not made contributions to the UMW Funds in connection with the coal it sold to Kaiser. When the trustees filed suit to collect royalties on the purchased coal, Kaiser raised the defense that the "purchase of coal" clause in the collective bargaining agreement violated basic antitrust provisions of the Sherman Act (15 U.S.C. §§ 1, 2) and the hot cargo provision of the LMRA (29 U.S.C. § 158(e)). Hence, its promise to pay royalties based on purchased coal was void and unenforceable.

Respondents argued, in essence, that under *Lewis* v. *Benedict*, fund trustees, as innocent third-party beneficiaries, were not subject to the illegality defenses to a contract they did not negotiate just as they were not subject to a set-off for damages resulting from an illegal strike they did not cause and could not prevent. Although the Court recognized that payments to employee benefit funds are generally legal, and did not repudiate the proposition that pension and welfare provisions of collective bargaining agreements may to some extent be regarded as independent of the rest of the contract, it also noted that trustees have no *special status* which exempts them from the general rule that courts do not enforce *illegal contracts*. The "purchase of coal" clause at issue here was the *very measure* of Kaiser's contractual obligations to the funds and was *itself illegal*. Rejecting Respondents' reliance on *Lewis* v. *Benedict* and the legislative history in support of

MPPAA, the Court merely noted that *Lewis* was not intended to give trustees the right to enforce *illegal promises*; that MPPAA was not intended to *implicitly* repeal *existing federal law*; and that if Congress wished to permit trustees to collect monies based on promises otherwise violative of federal law the legislature itself should have created a specific exemption.

Neither the LMRA nor ERISA provides for the *mandatory arbitration* of disputes arising under collective bargaining agreements. *Kaiser Steel* did not overrule *Lewis* v. *Benedict* and did not erode this Court's *pre-ERISA* pronouncement that employee benefit fund trustees *are* uniquely situated third-party beneficiaries and are *generally not* subject to defenses that can be raised by promisor employers against promisee unions. Indeed, the *very limited* scope of the holding in *Kaiser Steel* compared with the breadth of the issue as framed and resolved by the Court in *Lewis* v. *Benedict* supports the proposition, held by a majority of courts including the Eighth Circuit, that *Lewis* v. *Benedict* can and should be read to encompass the procedural defense of exhaustion.

When Prosser and Schneider executed collective bargaining agreements and agreed to be bound by the terms and conditions of the Trust Agreements governing the Funds, the Trustees had the right to rely on unobstructed access to a federal tribunal. Absent unequivocal words in the agreements to the contrary, there is no merit to the argument that mandatory deferral of these audit and collection disputes is required by law. Indeed, the Third Circuit has indicated that parties to collective bargaining agreements cannot subject trustees of employee benefit funds to an arbitral forum without their "explicit" consent. *Siemens*, 114 L.R.R.M. 3403-4.

I.C.2. Congress intended that the federal statutory rights of these uniquely-situated third-party beneficiaries be advanced and protected by federal court procedures; Trustees do not seek greater substantive rights than those negotiated by the parties to the collective bargaining agreement

i. The Trustees of employee benefit funds are entitled by statute to the procedural safeguards and other advantages of federal court review

Trustees of multiemployer funds have a *statutory* right to file actions in federal court to collect contributions owed (29 U.S.C. §§ 1001(b), 1132, 1145). Indeed, they have a statutory *obligation* to do so since contributions owed but not collected are fund assets which, if left in an employer's hands, constitute an extension of credit to a party-in-interest which is a prohibited transaction under ERISA (29 U.S.C. § 1106(a)(1)(B)). Moreover, the Funds would be *unsecured* creditors with a limited priority in the event of a delinquent employer's bankruptcy.

Obviously, trustees cannot collect what they do not know is owed. Hence, the right to conduct audits is not only circumscribed within the right to collect, but is also implicit in ERISA's "prudent man" rule (29 U.S.C. § 1104, App. B). In exercising the twin fiduciary obligations of auditing employer records to verify the accuracy of reporting and collecting delinquent contributions, the Trustees are in turn protecting the interests of hundreds of thousands of participants and beneficiaries who themselves not only have statutory rights to benefits but also the right to *rely on the Trustees* to protect the financial solvency of the Funds.

Petitioners, relying on the Seventh Circuit's decision in *Central States* v. *Howard Martin*, 625 F. 2d 171 (7th Cir. 1980), contend that the right to present a case before a federal court rather than to an arbitrator is a *greater* right than that which the employer and the union can enjoy under the collective bargaining agreement, and hence should not be available to the *third-party beneficiary trustees*. The Seventh Circuit in turn relied on a pre-ERISA case, *IBEW, Local 308* v. *Dave's Electric Service*, 382 F. Supp. 427 (M.D. Fla. 1974), in which the district court stated at p. 433:

> Requiring arbitration, of course, *will not subvert any rights*. It will *merely change the initial forum in which those rights are determined to the preferred forum as a matter of national labor policy and the selected forum by the terms of the agreement itself.* (emphasis supplied)

The position taken by the district courts in *Dave's Electric and in Howard Martin*, (No. IP 78-226-C, S.D. Ind. 1979), and

by the Seventh Circuit is clearly erroneous. As the Supreme Court stated in *Alexander* v. *Gardner-Denver*, 415 U.S. 36, 56: "We have long recognized that 'the choice of forums inevitably affects the scope of the substantive right to be vindicated' " (quoting from *U.S. Bulk Carriers* v. *Arguelles*, 400 U.S. 351, 359-390 (1971).

As far back as 1965, Justice Black in *Republic Steel Corp.* v. *Maddox*, 379 U.S. 650 (1965) wrote a very strong dissenting opinion in which he contrasted arbitration and judicial proceedings in the context of an employee's attempted contract action for severance pay:

> Arbitration differs from judicial proceedings in many ways.(...); arbitrators need not be instructed in the law; they are not bound by the rules of evidence; they need not give reasons for their awards; witnesses need not be sworn; the record of proceedings need not be complete; and judicial review, it has been held, is extremely limited.

379 U.S. at 664. In other words, Justice Black believed that it "can make a crucial difference" whether claims are settled by arbitration or by a court.

Nine years later, Justice Black's distinctions were espoused by this Court in *Alexander* v. *Gardner-Denver*, 415 U.S. 36 (1974), cited by the Eighth Circuit. In asserting that "arbitration is a comparatively inappropriate forum for the final resolution of rights created by Title VII (p. 56)," Justice Powell, speaking for a *unanimous* Court, noted that:

> . . . the fact-finding process in arbitration is usually not equivalent to judicial fact finding. The record of the arbitration proceedings is not as complete; the usual rules of evidence do not apply; and rights and procedures common to civil trials, such as discovery, compulsory process, cross-examination, and testimony under oath are often severely limited or unavailable. *See Bernhardt* v. *Polygraphic Co.*, 350 U.S. 198, 203 (1956); *Wilko* v. *Swan*, 346 U.S. at 435-437. And as this Court has recognized, "arbitrators have no obligation to the court to give their reasons for an award." *United Steelworkers of America* v. *Enter-*

> *prise Wheel and Car Corp.*, 363 U.S. at 598. Indeed, it is the informality of arbitral procedure that enables it to function as an efficient, inexpensive, and expeditious means for dispute resolution.

415 U.S. at 57-58. The Court went on to suggest that if Title VII rights were to be adequately *insured* in an arbitral forum, arbitration would tend to become a procedurally complex, expensive, and time-consuming process (p. 59). Thus, the very reasons why parties to collective bargaining agreements opt for arbitration instead of litigation would no longer exist. In enacting ERISA, Congress contemplated that fund trustees would have access to the procedural formalities of the federal courts.

It should also be noted that collection actions rarely involve only "coverage" disputes such as the ones that occurred in the Schneider litigation and in *Howard Martin, supra*. Often questions of coverage under a collective bargaining agreement are accompanied by disputes, for example, over accounting problems, the appropriate statute of limitations, or the duty to contribute after contract expiration. Answers to Fund complaints generally contain a list of defenses besides exhaustion, typically, laches, waiver, estoppel, accord and satisfaction, and failure to state a claim. Resolution of the merits of these defenses in 301(a) or 502 actions requires the application of federal labor and pension law to the facts. *See Audit Services, Inc.* v. *Rolfson*, 641 F.2d 757 (9th Cir. 1981). In *Alexander* v. *Gardner-Denver, supra*, the Court expressly stated that "the specialized competence of arbitrators pertains primarily to the law of the shop, not the law of the land" (p. 57). Mandatory deferral would require the Trustees either to split a collection action immediately or to await the outcome of arbitration with all the attendant risks of delay.

A further reason why mandatory deferral would prejudice the Funds concerns the issue of remedies. In *Barrentine* v. *Arkansas-Best Freight Systems, Inc.*, 450 U.S. 728 (1981), this Court noted that arbitral procedures are not merely less protective of statutory rights than are judicial procedures, but that arbitrators are often powerless to apply remedies that are provided for in the operative statute. Indeed, Justice Brennan,

speaking for a majority of seven, stated that it would be "most unlikely" that an arbitrator would have the contractual authority to award an aggrieved employee the liquidated damages, costs, and attorney fees provided by the FLSA (p. 745). Similarly, in cases like the ones at bar, an arbitrator would be "most unlikely" to award fund trustees the double interest, liquidated damages, costs and reasonable attorney fees which are *now mandatory* under ERISA (29 U.S.C. § 1132(g)(2)) where trustees prevail *in court* in an action to collect delinquent contributions. It would not take much ingenuity on the part of an employer sued by a fund to allege a "contract interpretation" dispute, demand exhaustion, and thereby avoid the remedies Congress was at pains to provide in enacting MPPAA. In such a situation, there cannot be a "therapeutic" value in mandating the deferral of *frivolous* claims as suggested in *United Steelworkers* v. *American Manufacturing Co.*, 363 U.S. 564, 568. It must be emphasized that under *Steelworkers'* principles courts have *no authority* to examine the merits of a grievance (hence, a disputed interpretation of a patently clear contract term). The *Howard Martin* court did not appear to realize this when it drew a distinction between "simple collection actions" (nondeferrable) and actions involving *bona fide* disputes over contract terms (deferrable). And, as the Fifth Circuit observed in *Bugher* v. *Consolidated X-Ray Service Corp., supra:* "If a delinquency were truly undisputed . . . one assumes that legal action would not be necessary at all" (p. 1434).

Yet another problem with mandatory deferral derives from the *Steelworkers Trilogy* and was illustrated in the recent case of *W.R. Grace & Co.* v. *Local Union 759*, 103 S. Ct. 2177 (1983): lack of *stare decisis* or *res judicata* principles in arbitration and hence a lack of finality. As long as an arbitration award derives its "essence" from the collective bargaining agreement, it cannot be overturned *by a reviewing court.* This rule does not, however, require an *arbitrator* to *defer to the decision of a prior arbitrator* if he believes the former's reasoning to have been unsound, as occurred in *Grace.*

In a recent Second Circuit opinion, the problem of lack of finality of arbitration awards was even more strikingly illus-

trated. *Connecticut Light and Power Co.* v. *Local 420, IBEW*, 718 F.2d 14 (2d Cir. 1983). The issue faced by the Second Circuit was how to resolve or reconcile *conflicting arbitration awards* each of *which drew their "essence" from the collective bargaining agreement but nevertheless resulted in differing conclusions and purported to bind the future conduct of the company and the union*[19]. The court set forth guidelines to be followed in the case of conflicting arbitration awards involving identical issues and identical parties: first, each award must be viewed separately to see if it draws its essence from the collective bargaining agreement; if one does and the other does not, the award that does clearly controls; if both draw their essence from the contract and hence meet the tests established in the *Steelworkers Trilogy*, the court must enforce that *arbitration award whose rationale* best reflects the intent of the parties (which brings the court perilously close to interpreting the contract *de novo* although the court insisted that an *independent review* was not permitted unless *neither* award drew its essence from the collective bargaining agreement).

Significantly, the court of appeals noted that conflicting arbitration awards are not anomalous but consistent with the actual practice of arbitrators; moreover, that collective bargaining agreements themselves *contemplate* that different ar-

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[19] In *Grace*, the issue was whether a conciliation agreement entered into by a company and the EEOC, which effectively changed the seniority provisions of a collective bargaining agreement without the union's consent, took precedence over the collective bargaining agreement. Both arbitrators found that the company breached the collective bargaining agreement by acting in accordance with the conciliation agreement. They differed, however, in whether back pay should be awarded to employees laid off in compliance with a conciliation agreement which a district court declared was enforceable. The Fifth Circuit and this Court found that the collective bargaining agreement took precedence over the conciliation agreement and upheld the ruling of the second arbitrator who had awarded back pay. In *Connecticut Light & Power*, the issue was whether the company could unilaterally change the size of work crews. The arbitrators differed on whether this "management prerogative" was circumscribed by the "safety provisions" of the collective bargaining agreement. The union filed a grievance each time a reduced crew was sent out. Hence, the conflicting arbitration awards required judicial resolution. (Ultimately, the Second Circuit upheld the ruling of the second arbitrator who found in favor of the company.)

bitrators will decide differently on identical issues. Hence, unless the conflict is one that results in a "cease and desist" order *binding the parties in the future*, courts have traditionally upheld and should continue to enforce any arbitration award that meets the criteria of the *Steelworkers Trilogy*. Thus, an inherent product of the flexibility of the collective bargaining *process* is the flexibility of *arbitration awards*, which includes permissible inconsistency.

Decisions affecting employee benefit rights, especially coverage under a collective bargaining agreement, require consistency and finality. Conflicting arbitration decisions on coverage could not only affect an employee's ability to obtain vested pension rights (based on past industry service and current service in covered employment); they could actually result in breaks in service and forfeitures. Moreover, conflicting arbitration decisions concerning coverage could adversely affect the fund's perception of its contribution base and hence the actuarial assumptions that form the predicate for funding policy. Since different and conflicting arbitration awards on identical contractual issues are not only possible but enforceable, trustees cannot *rely* on them in making long-term decisions. While conflicting awards would be less likely under contracts having area or national grievance committees, and while district courts are not bound to each other's decisions, trustees should be allowed to choose for themselves a forum that affords the possibility of greater consistency and greater finality, a forum that is governed by principles of *stare decisis, res judicata,* and *collateral estoppel;* a forum prepared to dismiss as a matter of course claims that are *patently frivolous;* and a forum whose initial judgment permits a more thorough review — namely, a federal district court!

In sum, Petitioners' argument is correct! Respondents *are* seeking a *procedural right* that is greater than the one available to the employer or the union. However, the right to federal court protection is warranted by the Trustees' status as unique third-party beneficiaries under *Lewis* v *Benedict*, by the number of participant rights they are bound to protect (ca. 500,000), and by the statutory origin of the rights they are both exercising and protecting.

ii. The Trustees are not seeking greater substantive rights than those afforded by the collective bargaining agreement

Petitioners' arguments are premised on the assumption that an employer's substantive obligations will be *increased* if courts, rather than arbitrators, are permitted to resolve disputed terms of collective bargaining agreements. Petitioners' Amici have gone so far as to state that *only* arbitrators can resolve disputes involving the pension and health and welfare provisions of collective bargaining agreements and that such issues are beyond the competence of judges and juries (Brief of Amici, pp. 2, 9-10). There is no authority for such a proposition.

Courts obviously interpreted collective bargaining agreements long before Congress enacted Section 203(d) of the LMRA and this Court decided the *Steelworkers Trilogy*. What, indeed, was the point of Congress's enacting Section 301(a) of the LMRA giving federal courts jurisdiction to hear suits based on breaches of collective bargaining agreements if Congress believed that courts are incompetent to interpret such documents? Moreover, how can such an approach be reconciled with the fact that some collective bargaining agreements do not have a mandatory grievance/arbitration clause or *exclude* some disputes from its coverage? In this regard it cannot be overemphasized that exhaustion is generally required in 301(a) actions *not* because courts are incompetent to interpret collective bargaining agreements *de novo* but because *grievance/arbitration clauses are themselves part of the contract and hence susceptible to enforcement. Hines* v. *Anchor Motor Freight, Inc.*, 424 U.S. 554 (1976).

It may also be noted that the right to arbitrate can be waived. In *Laborers Health and Welfare Trust Fund* v. *Kaufman & Broad*, 707 F. 2d 412 (9th Cir. 1983), the trustees filed suit in state court to collect contributions on behalf of employees performing "callback work." (An audit revealed that the employer was using non-union employees for this work and was not remitting contributions on their behalf.) The employer removed the action to federal district court and moved for summary judgment on the grounds that the work

was not covered by the collective bargaining agreement. Alternatively, the company argued that "callback work" was not within the jurisdiction of the union. Thus, the dispute was subject to the exclusive jurisdiction of the NLRB. The district court rejected this argument but found that the work was not "covered." The Ninth Circuit affirmed the district court's assumption of jurisdiction on grounds peculiarly analogous to those the Trustees are asserting here: "The primary jurisdiction rationale is inapplicable where the injured party bringing the suit has no acceptable means to invoke the Board's jurisdiction and cannot induce its adversary to do so." In other words, since the Trustees had no standing to apply to the NLRB for relief, their 301(a) action was not subject to dismissal. The court of appeals remanded the covered dispute to the district court, having found its grant of a summary judgment unwarranted in the circumstances. The court also rejected the fund's request for arbitration, plaintiff's "suddenly discovered affection for arbitration" having come too late (after seven months of district court litigation)! Having deemed the right to arbitrate waived, the Ninth Circuit evidently believed the district court was equipped to resolve the issue of whether employees who performed "callback work" were covered by the collective bargaining agreement and hence entitled to contributions. (It should be noted that Petitioners have cited this case as one of the four circuit decisions in conflict with that of the Eighth Circuit! Admittedly, the Ninth Circuit did give approval to *Howard Martin* in a footnote, though it failed to apply its reasoning in any manner whatsoever.)

Both the Sixth and the Ninth Circuit Courts of Appeal have provided guidelines for the judicial interpretation of collective bargaining agreements. *UAW* v. *Yard Man, Inc.*, 716 F.2d 1476 (6th Cir. 1983); *Kemmis* v. *McGoldrick*, 706 F.2d 993 (9th Cir. 1983). *See also Syufy Enterprises* v. *Northern California State Association of IATSE Locals*, 631 F.2d 124 (9th Cir. 1980).

Petitioner Schneider has devoted a number of pages of its Brief (pp. 22-24, App. 6-15) to illustrate that the collective bargaining agreements in question are particularly ambiguous

and are "therefore for an arbitrator, not a federal court" to resolve (p. 22). The Eighth Circuit did not find the disputed terms sufficiently ambiguous to require the industrial expertise of an arbitrator. Indeed, a first year law student would be able to make the "incredible" distinction between an employee *hired* on a "part time" basis (not eligible for contributions) and a *regular* employee who *happens to work part-time* because of his employer's fluctuating needs (who is entitled to contributions). (*See, supra,* p. 2, fn. 2 and p. 3, fn. 4.) It cannot be seriously contended that a federal district court could not "unravel" the ambiguities; that such adjudication would "upset" the agreement between the parties to the contract, or would "ignore" their intent, as Petitioner Schneider contends (p. 18).

In any event, the issue before this court is not whether Schneider's "extras" are entitled to contributions but, rather, what *forum* is entitled to make this decision. This is a far cry from suggesting that the Trustees are attempting to *determine for themselves who should be covered.*

II. MANDATORY DEFERRAL TO INTRACONTRACTUAL MECHANISMS WHICH CAN BE INVOKED ONLY BY THE UNION ON *BEHALF* OF THE TRUSTEES IS CONTRARY TO NATIONAL PENSION POLICY

The crux of the issue before this Court is whether it is reasonable to require employee benefit fund trustees to exhaust intracontractual mechanisms to which they have no access and which require the efforts of a union on their behalf. The Eighth Circuit determined that compulsory exhaustion in these circumstances created specific dangers for the Funds and was inconsistent with Congressional intent and national pension policy. The Eighth Circuit's reasoning was followed by the Fifth and the Third Circuits.

The present split in the circuits was spawned in 1980 when the Seventh Circuit decided *Central States, Southeast and Southwest Areas Pension Fund* v. *Howard Martin*, 625 F.2d 171 (7th Cir. 1980). In *Howard Martin, supra*, a panel of the Seventh Circuit decided that if a question of employee cover-

age under a collective bargaining agreement was raised, an employer could not be regarded as "delinquent" for the purposes of a trustee action until the contract was *first interpreted through the appropriate grievance mechanism*. In other words, the trustees could not go directly to court to have such contractual disputes adjudicated. (The issue in *Howard Martin* was whether "emergency" or "temporary" employees were "covered" by the contract and hence eligible for contributions.)

The court's interpretation of the term "delinquent" clearly departs from standard English usage. *Black's Law Dictionary*, for example, defines the word "delinquent" as follows: "as applied to a debt or claim, it means *simply due and unpaid at the time of law or fixed by contract*" (1979, emphasis supplied). The *American Heritage Dictionary of the English Language* defines the term "delinquent" as "overdue in payment" as in "a *delinquent* account" or "failing to do what is required by law or obligation" (1978). These definitions comply with the language of the Central States Trust Agreements: a delinquent contribution is one not paid in accordance with the time limits fixed by the Trustees (*see* Article III, Section 2, J.A. 21). This is also the meaning intended in 29 U.S.C. § 1145 which gives plan trustees a cause of action if contributions are not remitted in accordance with "the terms of the plan or under the terms of a collectively bargained agreement." There is nothing in ERISA, the Trust Agreements, or, indeed, in Howard Martin's collective bargaining agreement that defined a "delinquent" contribution as one either "conceded to be such" by the employer or "determined to be such by an arbitrator." The same is true of the instruments in the case at bar. Nevertheless, Prosser states at page 16 of its Brief that "unless and until the union successfully prosecutes the grievance, there is no breach of the contract for which the Trustees can sue." Hence, if the union does nothing, does not *raise* a grievance, there is presumptively no "delinquency," nothing to arbitrate, and no basis for filing suit since the proposed condition precedent would not have been satisfied, notwithstanding the Trustees *complaint* states that *payments due were not timely made*. This approach in the context of ERISA is totally without merit since it leaves the union in

absolute control of whether a collection action will or will not be filed.

The Seventh Circuit then compounded its distortion of the terms "delinquent" and "delinquency" by *ignoring the language* of the grievance/arbitration clause of the National Master Freight Agreement, namely, that its mechanisms could be set in force "*only by the authorized Union representative or the employer*" (emphasis supplied).[20] Although the court acknowledged the *existence* of this language, it nevertheless rejected as meritless the Fund's contention that the Trustees should not be required to exhaust mechanisms which they were not contractually empowered to invoke. The court stated:

> The argument falls of its own weight, however. To trigger the arbitration process, the Funds need only inform the Union, the members of which the funds exist to serve, that Martin disputes the coverage of certain workers and ask the Union, the organization of primary interest, to file a grievance against Martin.

In so concluding, the Seventh Circuit not only ignored an express provision of the collective bargaining agreement, it also failed totally to examine the implications of its decision for the mandate of trustee independence. Nevertheless, the Funds sent the appropriate union the relevant records, informed it of the coverage dispute, and requested it to take appropriate action.

The Funds filed suit to collect delinquent contributions from Howard Martin in 1979; the Seventh Circuit required deferral to arbitration in July, 1980. On October 13, 1982, when the Eighth Circuit *en banc* heard oral arguments in the case at bar, Howard Martin's arbitration still had not occurred. Howard Martin was placed in involuntary bankruptcy in

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[20] The court also disregarded the fact that the grievance clause of the Supplemental Agreement to the National Master Freight Agreement, to which Howard Martin was bound, specifically excluded from its coverage and therefore from the union's no-strike obligation the issue of delinquent contributions to the pension and health and welfare funds. The other mistaken assumptions were set forth in Respondents' Brief in Opposition to Petitions for Writs of Certiorari, p. 10, fn. 6.

early 1983 (*S.D.F. Inc., d/b/a Howard Martin*, IP83-1160-B (Bankr. Indianapolis, Indiana 1983, leaving the Trustees, as unsecured creditors, with a probably uncollectible proof of claim including $113,000.00 relating specifically to delinquencies involving unadjudicated "coverage dispute"). Thus, *mandatory deferral* is no guarantee of prompt dispute resolutions affecting employee benefit funds, and the Trustees' concerns in this regard are anything but *purely speculative*, as Prosser asserts (p. 35).

Moreover, direct access to a judicial forum by *fund trustees* (as opposed to *individual employees*) will not have the effect of turning the federal judiciary into "small claims courts," as reasonably feared by Chief Justice Burger in his dissenting opinion in *Barrentine* v. *Arkansas-Best Freight Systems, Inc.*, 450 U.S. 728, 746 (1981).[21] Numbers such as those in *Howard Martin* and *Laborers* v. *Kaufman & Broad*, 707 F.2d 412 (9th Cir. 1983) ($131,887.68), speak for themselves, though numbers alone are, of course, not dispositive of the Trustees' right to file suit. Normally complaints are not filed until other efforts to resolve disputes have failed. Fund trustees required by 29 U.S.C. § 1104(a)(1)(A)(ii) to defray the costs of administering the plans reasonably are *not* only *prohibited* from filing frivolous lawsuits but are now permitted to refrain from filing lawsuits based on an analysis of the merits of the legal issues involved and the collectibility of the delinquent employer (DOL and IRS Reg. 76-1, 41 F.R. 12740).

The Eighth Circuit carefully examined the relationship between unions and trust funds and the policies that led

[21] Prosser, at p. 27, has cited statistics showing that the total number of civil cases filed has risen 14.2% from 1981 to 1982 and the number of cases filed under labor statutes rose 10% during the same period. To the extent that the statistics cited are meant to infer that the increase in cases filed is attributable to collection cases under ERISA, the inference is erroneous. The Annual Report of the Director, Administrative Office of the U.S. Courts, states, "The nationwide increase of 14.2 percent in civil cases filed occurred primarily because of a 30.0 percent rise in cases in which the U.S. government was plaintiff" (p. 4, 1982). Further, the category of cases filed under labor statutes includes cases filed under *all* labor statutes; it certainly does not distinguish between actions filed under ERISA for benefit claims or actions filed under ERISA by trustees for the collection of delinquent contributions. Thus, at best the statistics are inconclusive. *See also the* Affidavit of Donald Weyerich (App. E) which rebuts the erroneous statements imputed to him on pp. 27 and 28 of Prosser's Brief.

Congress to require total independence between the two. The notion of independence and absolute trustee neutrality was unequivocally confirmed by this Court in *United Mine Workers of America Health and Retirement Funds* v. *Robinson*, 455 U.S. 562 (1982) and *NLRB* v. *Amax Coal Co.*, 453 U.S. 322 (1981). Although employee benefit law is still in its genesis, two pronouncements from this Court have emerged with striking clarity: trust administration is qualitatively different from collective bargaining and trustees must function independently in order to fulfill the neutral fiduciary role Congress has assigned to them. Indeed, the very concept of forced reliance on unions whose interests may not always coincide with those of the funds and over whom the trustees have no control cannot be reconciled with the fact that fund trustees stand completely outside of the collective bargaining process, are not the agents of those who appoint them, owe undivided loyalty to participants and beneficiaries, and must maintain strict neutrality with uncomprising rigidity. *See NLRB* v. *Amax Coal Co., supra.*

Mandatory deferral to an arbitration process which they cannot invoke places fund trustees in just such a position of involuntary reliance. As the Fifth Circuit recently noted: "By carelessness or deliberate refusal to act, the Union could completely thwart the Trustees' ability to administer and ensure payments to the trust funds. Though in full possession of their fiduciary duties, the Trustees could exercise their fiduciary powers only at the Union's discretion. Such a situation would completely violate the Congressional directive that control of fringe benefit funds shall not rest with the unions." *Bugher* v. *Consolidated X-Ray Service Corp.*, 705 F.2d 1426, 1432 (5th Cir. 1983). (Although Schneider suggests that the Fifth Circuit only treated the issue of mandatory deferral "tangentially" (p. 44), the *Bugher* court decided a number of issues closely related to ones in the case at bar, carefully compared the Eighth Circuit's rationale with that of the Seventh Circuit in *Howard Martin*, and *explicitly* found the former approach "more persuasive.")[22]

[22] Schneider's interpretation of the *Bugher* case misperceives the facts and issues involved. *See* Bugher's Brief in Opposition to Petition for Certiorari, 83-421. (Petition pending)

The Eighth Circuit set forth a number of concrete and practical reasons why reliance on unions to protect the interests of employee benefit funds and plan participants would be misplaced (A-16-18). Most importantly, the court observed that if money is limited, as it usually is, choices must be made and priorities established. In this situation, the union's primary interest, quite properly, would lie in keeping as many of its members working as possible. Certainly, it would be reasonable for it to seek *first* to protect the wages of active members of the bargaining unit and *only then* to secure the retirement benefits of former employees or their families. As the court noted, the latter persons may no longer be members of the bargaining unit whom the union has an affirmative duty to represent. *See Allied Chemical & Alkali Workers of America, Local 1* v. *Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971). Conversely, the trustees of employee benefit funds owe *fiduciary obligations* to *precisely* such persons. Contrary to Prosser's statement (p. 33), it is *only* the Trustees and *not* the union who owe a *fiduciary duty* to active plan participants, retirees, and their families to audit employer records and collect delinquent contributions in the *exclusive interest* of maintaining the solvency of the Funds. *See Rosen* v. *Hotel & Restaurant Employees, Local 274*, 637 F.2d 592 (3d Cir. 1981), *cert. denied*, 102 S. Ct. 398 (1981).

Priorities based on economic necessities are perfectly legitimate. Thus, it is well-established law that the duty of fair representation does not prevent unions from making economic decisions that have differential effects. *See United Mine Workers of America Health and Retirement Funds* v. *Robinson*, 455 U.S. 562 (1982). Indeed, recognizing that such decisions are legitimate, the Third Circuit stressed why union domination of a trust fund would result in precisely the kind of conflict of interest that Section 302(c)(5) of the LMRA was designed to prevent by requiring neutral and independent administration of Taft-Hartley funds. *Nedd* v. *United Mine Workers of America*, 556 F.2d 190 (3d Cir. 1977). Unions should not be forced into a position where they must choose whether to press a meritorious grievance on behalf of a benefit fund and possibly put an employer out of business or to allow the delinquencies to accumulate so as not to jeopardize jobs. Independent trustees may not make such choices.

While the union may have a *legal* duty of fair representation to *non-union* members of the bargaining unit, it may lack *incentive* to enforce the collective bargaining agreement on a day-to-day basis *on behalf* of such individuals, not to mention process a benefit fund's grievance on their behalf. An illustrative case is *Manning* v. *Wiscombe*, 498 F.2d 1311 (10th Cir. 1974), in which the Court of Appeals for the Tenth Circuit held that an employer was delinquent for contributions on behalf of non-union members of a bargaining unit even though the contract "from its inception was applied on a 'members-only' basis." The court, noting that a reading of the collective bargaining agreement together with the applicable trust agreement clearly defined covered employees as encompassing non-union as well as union members, stated:

> We must now consider whether the fact that the contract has been applied on a "members-only" basis serves to relieve Wiscombe of the liability imposed under the plain wording of the agreement. The trustee here stands as a third-party beneficiary of the collective bargaining agreement and his rights vested upon the signing of the contract and the creation of the trust fund. The *primary parties cannot modify by subsequent conduct the express terms of an agreement* without the consent of *a third-party beneficiary* whose rights have vested.

498 F.2d at 1313, emphasis supplied.

The *lack of incentive* for a union to process a "coverage dispute" on behalf of trust funds would obviously be even greater where the union is *decertified*. *See*, *supra*, p. 4 and fn. 6.

A further reason why a union might lack the *incentive* to get involved in trustee audit and collection disputes is that arbitration is *costly*. ERISA requires an employer who loses in a collection action to reimburse the fund for its costs and attorney fees. Unions cannot be reimbursed *either* by the fund *or* by the employer. Arbitration of "coverage disputes" in connection with trust fund claims may, for quite practical reasons, not be high on the union's list of priorities. Notwithstanding *Layne Western Co., Inc.* v. *International Union*

of Operating Engineers, 650 F.2d 155 (8th Cir. 1981, overruled by the Eighth Circuit *en banc* in its *Prosser* decision), there is not much evidence that unions tend to strike *as a matter of course* for delinquent contributions, particularly during periods of economic uncertainty and unemployment. As the district court noted in the most recent phase of the *Nedd* litigation, *Ambromovage* v. *Thomas*, (No. 8796, M.D. Pa. 1982), 3 EBC 1873, 1884, an independent trustee would not "be entitled to rely upon the Union as its collection agent; . . . . Even if the Union was willing to exercise its economic power on the trustee's behalf, that willingness would depend on whether the strike was in the interest of the Union membership generally. Because an independent trustee would have realized this, that trustee would be entitled to rely on Union efforts only as a measure secondary to its own efforts."

As suggested in *Manning* v. *Wiscombe*, *supra*, and in *Barrentine* v. *Arkansas-Best Freight Systems, Inc.*, *supra*, unions and employers sometimes engage in "side agreements" in connection with employee compensation. Although this is eschewed by the LMRA and ERISA, "side agreements" or "oral modifications" of the benefit provisions of collective bargaining agreements do occur.[23] *See Lewis* v. *Harcliff Coal Co.*, 237 F. Supp. 6 (W.D. Pa. 1965); *Lewis* v. *Seanor Coal Co.*, 256 F. Supp. 456 (W.D. Pa. 1966), *aff'd*, F.2d 437 (3d Cir. 1967); *Boyle* v. *North Atlantic Coal Co.*, 331 F. Supp. 1107 (W.D. Pa. 1971); *Waggoner* v. *Dallaire*, 649 F.2d 1362 (9th Cir. 1981); *Kemmis* v. *McGoldrick*, 706 F.2d 993 (9th Cir. 1983); *Maxwell* v. *Lucky Construction Co.*, 710 F.2d 1395 (9th Cir. 1983). To date only *two* criminal convictions involving misreporting or other violations of collective bargaining agreements affecting employee benefit funds have been reported: *U.S.* v. *S & Vee Cartage*, 704 F.2d 914 (6th Cir. 1983), and *U.S.* v. *Russo*, 708 F.2d 209 (6th Cir. 1983). The possibility of criminal sanctions for violations of ERISA are not likely to prevent side agreements or other forms of misreporting that

[23] *See* New York Times Article, July 6, 1983, printed as an Appendix to Petitioners' Supplemental Brief in Support of its (pending) Petition for Certiorari in *Central States, et al.* v. *Central Transport, et al.*, 82-2157.

adversely affect employee benefit funds, and hence require a high degree of vigilance from trustees.

What are the funds to do if the union refuses to process a grievance on their behalf? Petitioners appear to believe, as did the *Howard Martin* court and a panel of the Eighth Circuit in *Central States, Southeast and Southwest Areas Pension Fund* v. *CRST*, 641 F.2d 616 (8th Cir. 1981, substantially overruled by the Court *en banc* in *Prosser*) that the union's "duty of fair representation" would impel the union to act. However, the union *has* no "duty of fair representation" *to the Funds and their Trustees*; this Court has precluded such a duty in its *Amax* decision, *supra*. So has Congress in enacting Section 302(c)(5).

If the Trustees file suit to compel an audit or to collect delinquent contributions and a defendant prevails on the affirmative defense of exhaustion because he alleges the existence of a "contract interpretation dispute," there is good reason to believe that the court will *dismiss* the action for lack of subject matter jurisdiction,[24] possibly precluding injunctive relief for the preservation of records and assets. Must the Trustees now file a *new* action seeking the original relief requested and *prove* to the court that the union refused to arbitrate and that the exhaustion requirement is "futile?" Would the standard be as high as it is for an employee who attempts to make the same claim? *See Vaca* v. *Sipes*, 386 U.S. 171 (1967). Would this be *fair* since the union is *not* the exclusive statutory representative of the Trustees? Under what authority could the Trustees simply *compel* the union to arbitrate? Could they, like an employee, file a *301(a) action* to enforce the grievance/arbitration clause of a collective bargaining agreement when they are not a *party* to the contract and when they have expressly denied that this clause has any application to them? Neither Petitioners nor those courts in opposition to the Eighth Circuit's approach have answered these questions on the basis of statutes or case law. Nor have they considered the risks of delay that mandatory deferral could cause.

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[24] This occurred in the cases at bar and in *Howard Martin*.

In a very recent decision, a panel of the Court of Appeals for the Third Circuit expressly adopted the approaches taken by the Eighth and Fifth Circuits for *all* of the contractual and policy reasons already discussed, rejecting the proposition (suggested in Chief Judge Seitz's separate concurring opinion) that the "Trustees should be free to initiate their own action *only* where a conflict of interest makes it *unlikely* that the union will arbitrate the Trustees' claim in good faith," *Trustees of Local 478 Pension Fund, et al.* v. *Siemens*, No. 82-5719 (Nov. 18, 1983). The court stated:

> . . . We share the Chief Judge's reluctance to widen federal trial court jurisdiction at the expense of the valuable processes of arbitration. We believe it is preferable to follow the "bright line" approach established here [direct access to federal courts] for a number of reasons. First, the other approach would create an ancillary issue of the union's ability to arbitrate in good faith in every suit brought by the Trustees, making the union a necessary, if not indispensable, party to every Trustees' suit. The preliminary inquiry into the existence of actual or potential conflict between the trustees and the union would generate more trial court activity than it would abate and would, in many instances, be more extended and complex than resolution of the merits of the employer's asserted obligation to the pension fund. Second, the issue of good faith would be, by its very nature, divisive and would unnecessarily pit the Trustees and the union as opponents. Third, proof of the ability to arbitrate in good faith may often be speculative and difficult, leaving the trust beneficiaries inadequately protected against those conflicts of interest that may be subtle, or as yet unrevealed. For these reasons, we have opted for a generally applicable rule under which the litigation would be limited to the relevant issue of the company's obligation to make the payment. (114 L.R.R.M. 3406, emphasis supplied)

In addition to these troublesome *legal* issues, there would be very *practical* difficulties in following-up union activity if unions were compelled to invoke the contractual grievance mechanism of their collective bargaining agreements. As noted earlier, some 12,000 employers in 40 states contribute to the

Central States Funds pursuant to thousands of collective bargaining agreements with hundreds of different local unions. The Funds themselves have their headquarters in Chicago. The administrative burden and cost of follow-up would be substantial.

Another procedural difficulty facing the Trustees is that they may not know that an employer will dispute a "contract term" until a complaint has been filed and the answer received. The proper time for an employer to raise these issues would be immediately following an audit or a notice of delinquency from the Fund, namely, at a time when the employer, the union, and a Fund representative could discuss the dispute informally and attempt to resolve it without incurring litigation costs, which would also accommodate the policies of the LMRA and ERISA. The *Howard Martin* approach, which permits of belated exhaustion defenses, clearly poses a threat to fund assets and also burdens the judiciary with futile litigation.

As this Court acknowledged in *Kaiser Steel Corp.* v. *Mullins*, 455 U.S. 72, (1982), Congress expressly wanted to streamline and "simplify delinquency actions." Direct access to federal courts, e.g., the "bright line" approach advanced by the Third Circuit, will effectuate congressional intent.

III. IN ENACTING ERISA, CONGRESS DID NOT INTEND OR PROVIDE FOR THE ARBITRATION OF TRUSTEE AUDIT AND COLLECTION ACTIONS; MANDATORY DEFERRAL IS CONTRARY TO NATIONAL PENSION LAW

Where Congress has chosen to address itself to arbitration, it has done so directly and not by inference. With regard to the LMRA, Section 203(d), as noted above, merely expresses Congress's declaration that it is *desirable* for parties to collective bargaining agreements to *agree upon methods* for the final resolution of disputes arising over the interpretation or application of these contracts. *No* court has construed Section 203(d) to require *compulsory arbitration*. Indeed, such a construction would render Section 301(a) of the LMRA meaning-

less except as a vehicle for enforcing grievance/arbitration clauses or arbitration awards. However, Section 301(a) expressly confers federal jurisdiction to hear "suits for violation of contracts" between employers and unions without limitation even on the amount in controversy or citizenship of the parties. The requirement of exhaustion stems exclusively from the particular collective bargaining agreement in dispute and not from the statute.

In contrast to Section 203(d), which merely expresses a Congressional *preference*,, Section 302(c)(5)(B) of the LMRA *requires* the appointment of "an impartial umpire" to break deadlocks between employer and employee trustees either by agreement or, upon petition of either group, by appointment of the district court in which the trust fund has its principal office (App. A). The purpose of this provision, of course, is to ensure that boards of trustees will not be stalemated in their exclusive administrative functions. (The Trust Agreements of the Central States Funds contain a parallel provision for the breaking of trustee deadlocks (J.A. 19-20).) This provision would not require a board of trustees who, by majority vote, have authorized the institution of a lawsuit against a contributing employer to defer to the arbitration provision of the *employer's* collective bargaining agreement because of a disputed contract term;[25], contrary to Prosser's belief (pp. 28-31), 302(c)(5)(B) has *nothing* to do with the issue at bar.

With regard to ERISA, the following statement appeared in Senate Report No. 93-383 (August 21, 1973): "It is intended that under the rule which prohibits a fiduciary from jeopardizing the income or assets of a plan, fiduciaries will be subject to the usual trustees' duties such as (but not limited to) the duty to . . . *enforce claims of the plan*" (I *Leg. Hist. of ERISA*, Pub. L. No. 93-406, pp. 1172-1173 (1976), emphasis supplied). Legislative history contains *no* references to the arbitration of *trustee claims against employers on behalf of the plan*. The few references to arbitration that do exist refer to the arbitration of *employee benefit claims*. Where this was not possible under the grievance/arbitration provisions of a

[25] *Cf. Farmer* v. *Fisher*, 586 F.2d 1226 (8th Cir. 1978, substantially overruled by the Eighth Circuit's decision in *Prosser*).

collective bargaining agreement, Senator Hartke proposed that hearings should take place under the authority of the Secretary of Labor in accordance with rules and regulations to be promulgated by him in accordance with the Administrative Procedures Act (I *Leg. Hist. of ERISA*, pp. 1244-1247). The final conference report on ERISA (H.R. 2), as announced by Senator Javits on August 22, 1974, contained the following paragraph:

> **ARBITRATION OF BENEFIT CLAIMS**
>
> The Senate bill provided that each plan was to incorporate a procedure for arbitration of benefit claim disputes between the plan and participants and beneficiaries. The House bill contained no comparable provision. House conferees were opposed to the Senate provision on grounds it might be too costly to plans and a stimulant to frivolous benefit disputes, and at their insistence it was dropped in conference. I regret this decision since I believe the Senate bill would have provided a relatively inexpensive way for the resolution of minor benefit disputes for the many participants and beneficiaries who lack the resources to pursue their claims through the court. Nevertheless, I am encouraged that the conferees agreed to direct the Joint Pension Task Force to study the feasibility of this approach further, and by the acceptance of provisions contained in the original Williams-Javits bill that would require a full and fair claims procedure—section 503— as well as the provisions authorizing the Secretary of Labor to enforce benefits denied in violation of law—section 502(b).

III *Leg. Hist. of ERISA*, p. 4769 (1976). The Senate unanimously agreed to the Conference Report on H.R. 2, and the President signed ERISA into law on September 2, 1974.

The language of ERISA speaks for itself: 29 U.S.C. § 1001(b) provides "ready access to the Federal courts." Contrary to Prosser's contention (p. 41) this provision was not in any way intended to be limited to participants and beneficiaries. In the first place the emphasis here is on "federal" courts. Plan participants and beneficiaries have "*ready* access to *Federal* courts" only under 29 U.S.C. § 1132(a)(1)(A), (a)(2)

or (a)(3)(A) and (B), e.g., in actions against trustees for the refusal to disclose required information and other violations of ERISA. In pursuing *claims for benefits* under 29 U.S.C. § 1132(a)(1)(B), participants may invoke the aid of *state* as well as federal courts (29 U.S.C. § 1132(e)(1)). In addition, exhaustion of internal plan review and appeal procedures under 29 U.S.C. § 1133 is required as a condition precedent for filing an action in *any* court under 29 U.S.C. § 1132(a)(1)(B). This is similar to the exhaustion requirement imposed on individual employees pursuing claims covered by the grievance/arbitration clauses of collective bargaining agreements as a condition precedent to filing an action for breach of contract under Section 301(a) of the LMRA. ERISA does not impose a similar exhaustion requirement on trustees ("fiduciaries"). Moreover, trustees bringing actions under 29 U.S.C. § 1132(a)(3)(A) and (B) may do so *only* in *Federal* court (29 U.S.C. § 1132(e)(1)).Clearly, if anyone has "ready access" to federal courts, it is plan fiduciaries (trustees) pursuing *claims on behalf of the plan*. To put it somewhat differently, since Congress intended that the *enforcement of plan claims* is a "trustee duty," *supra*, and since 29 U.S.C. § 1105 makes "trustee responsibilities" *nondelegable*, mandatory deferral as a condition precedent to federal court litigation directly conflicts with legislative history and the text of the statute.

The exhaustion doctrine is particularly inconsistent with national pension policy as reflected in the Multiemployer Pension Plan Amendments Act of 1980 (Pub. L. No. 96-364), an Act in which Congress undertook to make some fundamental revisions of ERISA.

ERISA did not cure the problem of delinquent contributions. Indeed, in the six years following its enactment, the problem of delinquent contributions assumed such magnitude that Congress *created a new and distinct federal cause of action for their collection* (29 U.S.C. § 1145). As noted above, stringent new remedies, including double interest, liquidated damages, costs, and attorney fees were *mandated* if trustees prevailed in a collection action in *federal* court. It was believed that this would encourage correct reporting and deter

evasions. It was at this time, too, that Congress *withdrew* from the Secretary of Labor his power to collect delinquent contributions, thus placing the burden squarely on trustees. 29 U.S.C. § 1132(b)(2).

Had Congress intended to inject arbitration into the ERISA collection scheme, it had a perfect opportunity to do so in enacting MPPAA, for it provided a comprehensive scheme for the arbitration of disputes concerning employer withdrawal liability. Even here, however, the drafters of the Act contemplated a quasi-judicial type of proceeding, as evidenced by Rep. Frank Thompson's explanation to the House of Representatives:

> The committees intend *that the role of the arbitrator under this Act will be similar to that of a judge applying applicable law to the facts presented, and not a mediator attempting to reconcile competing interests*. In arbitration proceedings under various labor laws, issues are often compromised, in part so as to avoid damaging ongoing relationships between management and labor. Unlike proceedings of that type, the proceeding contemplated by the committees is intended to resolve disputes, to the extent possible, in favor of one of the parties rather than in favor of compromise. 126 Cong. Rec. (House) 23039 (August 25, 1980)

Arbitration in the context of resolving withdrawal liability disputes primarily involves the application of complex and technical statutory formulae to closed transactions and/or tests the reasonableness of a plan's actuarial assumptions in accordance with procedures being designed by the PBGC (29 U.S.C. § 1401(a)(2)).[26] Clearly, arbitration in this context is not part of an ongoing process of collective bargaining; does not give added content to open-ended collective bargaining agreements; and has no effect on the maintenance of industrial peace. Moreover, it is up to the *employer* to request arbitration; if a company does not request this form of review, the withdrawal liability and payment schedule determined by the

[26] The PBGC has already issued proposed Regulations on Arbitration of Disputes *in Multiemployer Plans, 48 F.R. 31251, July 7, 1983.* On information and belief final regulations on arbitration procedures will appear during the first few months of 1984.

trustees is *presumed* correct and payments are collectible in the same manner as delinquent contributions (29 U.S.C. § 1401(b)(1)). In short, there is no requirement for *mandatory arbitration* even here.

The fact that Congress provided for arbitration in the context of withdrawal liability but omitted it from its revision of provisions relating to delinquent contributions (29 U.S.C. §§ 1145, 1132(g)(2)) gives rise to the *inference* that mandatory deferral of trustee collection actions to the grievance mechanisms of collective bargaining agreements was not intended. More than that, legislative history actually fills the silence left by the text of the statute itself. As noted above, *supra*, p. 33, Congress intended to simplify delinquency collections and narrow the defenses available to employers resisting such actions to those based on violations of Section 302 of the LMRA (29 U.S.C. § 186). Exhaustion is *not* one of these defenses.

The Eighth Circuit concluded that "national pension policy" and "the rights of plan beneficiaries can be vindicated as Congress seems to have intended only if trustees are given a direct right of access to the courts" (A-18). This conclusion is correct and should be affirmed.

IV. TRUSTEE-INITIATED AUDITS TO VERIFY THE ACCURACY OF REPORTING ARE PURELY MATTERS OF TRUST ADMINISTRATION AND ENTIRELY OUTSIDE OF THE SCOPE OF THE COLLECTIVE BARGAINING PROCESS: MANDATORY DEFERRAL OF ISSUES ARISING IN THIS AREA IS INAPPROPRIATE AND CONTRARY TO NATIONAL PENSION POLICY

As the Eighth Circuit noted, the gravamen of the Trustees' dispute with Prosser concerned the right to conduct an audit as well as its permissible scope.

The contractual authority for the Trustees' right to audit the records of contributing employers is Article III, Section 5, sentence 2 of the Trust Agreements governing the Funds (J.A. 23). This provision authorizes the Trustees, by their representatives, to inspect "pertinent records" at the employer's place of business if deemed necessary for the proper administration of the trust. The statutory basis of this right is primarily 29 U.S.C. § 1104(a)(1)(B), the "prudent man" rule of ERISA

(App. B). Since ERISA requires pension funds to credit an employee with service toward the vesting of his benefits even where his employer never remitted contributions (App. C,D), audits to verify the accuracy of reporting play a particularly vital role in trust administration. As the Third Circuit observed, only fund trustees can adequately monitor employer contributions; unions are not in an informational position to do so. *Rosen* v. *Hotel and Restaurant Employees, Local 274*, 637 F.2d 592 (3d Cir. 1981); *see also Nichols* v. *Trustees of Asbestos Workers Pension Plan*, (No. 80-563, D.D.C. 1982), 3 EBC 1726.

Pursuing the goals set forth in ERISA and carrying out the tasks imposed upon them by the Act, the Central States Trustees determined on the basis of years of experience in trust administration that random general audits of participating employers' tax and payroll records are the single most reliable and effective means of uncovering delinquent contributions and identifying potentially eligible plan participants.

When Prosser executed collective bargaining agreements with Local 610, the company clearly agreed to be bound by the Trust Agreements governing the Funds and the acts of the Trustees. Hence, Prosser agreed not only to produce records but to abide by the Trustees' construction of the term "pertinent records." Nevertheless, Prosser persuaded the district court that the following issues were arbitrable:

> "1) Whether the Trustees have the right to demand inspection of the employment records of 'all employees covered by the collective bargaining agreements,' including those categories of employees for whom contributions are expressly excluded;
>
> 2) Whether the trustees have the right to seek to recover contributions, and to inspect records, pertaining to the period prior to February 28, 1979, when the Union and Prosser entered into a new collective bargaining agreement in reliance upon their understanding and interpretation of the prior agreement and the manner in which contributions were made pursuant thereto; and
>
> (3) Whether the trustees have the right to seek to recover contributions, and to inspect records, prior to January 4, 1978, since on that date a Union complaint to the National Labor Relations Board, alleging Prosser's refusal to allow

an audit of its records, was dismissed due to the Union's refusal to arbitrate (Brief, pp. 6-7).

The district court's dismissal was clearly erroneous.

Issues (2) and (3) are manifestly *legal* issues to be resolved by a court not an arbitrator: i.e., the appropriate statute of limitations for Trustee audit and collection actions initiated under the authority of the Trust Agreements; the binding effect of an NLRB order affecting the union involving a transaction to which the Trustees were not a party. The first issue (1) was likewise subject to judicial review: i.e., whether the Trustees' request for access to records of *all* employees was arbitrary and capricious.

It is well-established law that courts may not substitute their judgment for that of the trustees whether in the construction of the terms of the trust agreements from which their contractual authority derives or in implementing the "prudent man" rule of ERISA unless the trustees' conduct has been arbitrary and capricious. *Rehmar* v. *Smith*, 555 F.2d 1362, (9th Cir. 1976); *Gorman* v. *ILWU-PMA Benefit Funds*, 616 F.2d 433, (9th Cir. 1980); *Elser* v. *I.A.M. National Pension Fund*, 684 F.2d 648, (9th Cir. 1982); *Riley* v. *MEBA Pension Trust*, 570 F.2d 406 (2d Cir. 1977). While Respondents have *never* contended that coverage disputes of the type involved in the Schneider litigation are *not* suitable for arbitration in a dispute between the employer and the *union* (and should have been resolved between the parties long before this litigation commenced),[27] they have always maintained and do insist that the parties to a collective bargaining agreement have no right to attempt to interpret the provisions of the Trust Agreements governing the Funds when these agreements have accorded this right *exclusively* to the Trustees themselves (Article IV, Sec. 17, J.A. 26-27). Indeed, the thought of 12,000 employers each attempting to determine what records should be produced upon a request by the Trustees for a standard, routine audit does not even bear consideration. There is no authority for the proposition that the mere incorporation by reference of a trust agreement in a collective bargaining agreement *automatically* subjects the trust agreement to the grievance clause of the incorporating document. *See United Steelworkers* v. *General Steel Industries*, 499 F.2d 215 (8th Cir. 1974).

[27] Schneider's allegation on this point on page 14 of the Brief is absolutely unfounded

Although the *merits* of the audit dispute were not before the Court of Appeals, a consideration of the function of Central States' audits and a few facts concerning the operation of the Funds (which were presented to the Court in Appellants' Briefs) reveal why arbitration of audit issues is particularly inappropriate.

An employer's obligation to contribute to Central States is established in the collective bargaining agreement, which the Trustees of the Funds have no role in negotiating. Upon contractually agreeing to participate in the Central States trusts, the employer submits a list of employees "covered" by the collective bargaining agreement and "eligible" for contributions. This is known as the "base group." Thereafter, Central States must rely on the employer to accurately report fluctuations in the base group, for example, by adding newly hired "covered" employees as well as by reporting terminations.

Because of the size of the Funds and the geographical distribution of their constituency, reporting and the remittance of contributions depend on an honor system. Since the Central States Funds are based in Chicago, Illinois, there is no way for the Trustees to physically monitor employer reporting absent a field audit program (similar to that of the IRS) to verify that the reported amounts are correct.

While many employers report correctly, substantial discrepancies do occur, typically underreporting and nonreporting. An employer who "underreports" fails to contribute appropriately on behalf of employees he *concedes* are covered by the collective bargaining agreement and whom he has at some time reported to the Funds, whether by including them in the base group or by subsequently adding their names on monthly reporting forms. An audit of the records of concededly covered employees, as Prosser would advocate, would uncover this kind of misporting.

An employer who engages in the practice of "nonreporting" simply omits covered employees from the base group and never subsequently reports them to the Funds, thus eroding the actuarial solvency of both Funds and potentially increasing the unfunded vested benefits liability of the Pension Fund.[28]

[28] Unfunded vested benefits liability is the amount by which nonforfeitable benefits exceed fund assets. (29 U.S.C. § 1393 (c))

Audits limited to the records only of concededly covered employees clearly cannot detect or remedy nonreporting.

Numbers best illustrate the magnitude of the problem of nonreporting. If only 10% of the 12,000 employers in the pool omit only one single employee from their contribution reports, the annual loss of income to the Pension Fund would be approximately $2,745,600.00 ($44.00 per week per employee x 52 weeks x 1,200 employers).[29] Multiply even a fraction of this figure by 2,000 pension funds in the United States and the potential net loss is staggering.

Random audits of participating employers' records are intended to encourage accurate reporting, to deter contractual and statutory evasions, to protect the benefit status of all eligible plan participants, and to mitigate losses of fund assets. Moreover, they are designed to intrude as little as possible on privacy rights.

In a typical audit "pertinent records" relating to allegedly noncovered employees are limited. The auditors compare payroll registers with IRS 941 forms in order to verify that they are dealing with a "complete" employee population and that there are no missing payrolls or cash disbursements. Total dollar figures rather than individual earnings are of prime importance. If the totals match, the auditors spot-check personnel files of allegedly noncovered employees. If, on the basis of this spot-check, it appears that employees listed on the payroll for noncovered employees do not in fact perform bargaining unit work, that is the end of the audit as far as this group is concerned. Even with regard to the covered employees, the audit is limited to essential records: if two documents verify the accuracy of reporting, four will not be demanded.

Substantial safeguards are also offered to protect confidentiality. However, in accordance with standard auditing principles, which require at least some independent verification, the audit cannot be limited solely to employer-selected records of one segment of his work force, for example, the records of those employees the employer *concedes* are covered by the collective bargaining agreement. If limited only to these records, the Trustees might never discover the existence of

[29] This computation is based on the current average contribution rate.

covered employees the employer did not report in the first place, or they might discover them only at some later time when the employer was already out of business or bankrupt, thus precluding a recoupment action.

Given the importance of audits, their scope should only be limited, if at all, then only by a court.[30]

CONCLUSION

The cases relied on by Petitioners in support of their position do not require reversal of the Eighth Circuit's *en banc* decision. Respondents have already set forth in detail why the reasoning of the Seventh Circuit in *Howard Martin* conflicts both with decisions of this Court and with national pension and labor law and policy. In *Trustees of National Benefit Fund, etc.* v. *Constant Care Community Health Center, Inc.*, 669 F.2d 213 (4th Cir.), the Fourth Circuit's approval of *Howard Martin* was dictum since it decided that a "simple" collection action was before the court which did not require arbitration. *Laborers Health and Welfare Trust Fund* v. *Kaufman & Broad*, 707 F.2d 412 (9th Cir. 1983), is inapposite for a variety of reasons: the Trustees themselves *requested* arbitration; the court remanded a "coverage dispute" to the district court for trial because it found the Fund's "right" to arbitrate waived; the court approved of *Howard Martin* in dictum and yet held at the same time that the "primary jurisdiction" rule could not apply to a trust fund which had no access to the NLRB and could not obtain relief from it. *Central States, Southeast and Southwest Areas Pension Fund, et al.* v. *Central Transport*, 698 F.2d 802 (6th Cir. 1983), did not involve a choice of forums at all; the Court of Appeals for the Sixth Circuit itself limited the scope of the audit requested, never suggesting the dispute was arbitrable.

In contrast, the Fifth, Third, and Eighth Circuits carefully analyzed ERISA, the LMRA, federal labor and pension policy, and recent decisions of this and other courts. These courts all rejected the concept of mandatory deferral. For all the reasons set forth in this Brief, the decision of the Court of Appeals for the Eighth Circuit should be affirmed.

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[30] The scope of a proposed Central States' audit was *judicially* limited by the Court of Appeals for the Sixth Circuit. A Petition for a Writ of Certiorari is pending. *Central States, et al.* v. *Central Transport, et al.*, 82-2157.

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NOS. 82-1860 and 82-1862

In the

Supreme Court of the United States

October Term, 1982

SCHNEIDER MOVING AND STORAGE COMPANY,
Petitioner,

and

PROSSER'S MOVING AND STORAGE COMPANY,
Petitioner,

vs.

LORAN W. ROBBINS, et al., TRUSTEES OF THE CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION AND HEALTH AND WELFARE FUNDS,
Respondents.

RESPONDENTS' APPENDIX

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APPENDIX A

LABOR-MANAGEMENT RELATIONS ACT OF 1947

§ 173. Use of conciliation and mediation services as last resort

(d) Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement. The Service is directed to make its conciliation and mediation services available in the settlement of such grievance disputes only as a last resort and in exceptional cases.

§ 185. Suits by and against labor organizations

Venue, amount, and citizenship

(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

§ 186. Restrictions on financial transactions

Payment or lending, etc., of money by employer or agent to employees, representatives, or labor organizations

(a) It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, adviser, or consultant to an employer or who acts in the interest of an employer to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value—

(1) to any representative of any of his employees who are employed in an industry affecting commerce; or

(2) to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of

such employer who are employed in an industry affecting commerce; or

(3) to any employee or group or committee of employees of such employer employed in an industry affecting commerce in excess of their normal compensation for the purpose of causing such employee or group or committee directly or indirectly to influence any other employees in the exercise of the right to organize and bargain collectively through representatives of their own choosing; or

(4) to any officer or employee of a labor organization engaged in an industry affecting commerce with intent to influence him in respect to any of his actions, decisions, or duties as a representative of employees or as such officer or employee of such labor organization.

Request, demand, etc., for money or other thing of value

(b) (1) It shall be unlawful for any person to request, demand, receive, or accept, or agree to receive or accept, any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a) of this section.

(2) It shall be unlawful for any labor organization, or for any person acting as an officer, agent, representative, or employee of such labor organization, to demand or accept from the operator of any motor vehicle (as defined in part II of the Interstate Commerce Act) employed in the transportation of property in commerce, or the employer of any such operator, any money or other thing of value payable to such organization or to an officer, agent, representative or employee thereof as a fee or charge for the unloading, or in connection with the unloading, of the cargo of such vehicle: *Provided,* That nothing in this paragraph shall be construed to make unlawful any payment by an employer to any of his employees as compensation for their services as employees.

Exceptions

(c) The provisions of this section shall not be applicable (1) in respect to any money or other thing of value payable by an employer to any of his employees whose established duties include acting openly for such employer in matters of labor relations or personnel administration or to any representative of his employees, or to any officer or employee of a labor organization, who is also an employee or former employee of such employer, as compensation for, or by reason of, his service as an employee of such employer; (2) with respect to the payment or delivery of any money or other thing of value in satisfaction of a judgment of any court or a decision or award of an arbitrator or impartial chairman or in compromise, adjustment, settlement, or release of any claim, complaint, grievance, or dispute in the absence of fraud or duress; (3) with respect to the sale or purchase of an article or commodity at the prevailing market price in the regular course of business; (4) with respect to money deducted from the wages of employees in payment of membership dues in a labor organization: *Provided,* That the employer has received from each employee, on whose account such deductions are made, a written assignment which shall not be irrevocable for a period of more than one year, or beyond the termination date of the applicable collective agreement, whichever occurs sooner; (5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents): *Provided,* That (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance

to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of employees may agree upon and in the event the employer and employee groups deadlock on the administration of such fund and there are no neutral persons empowered to break such deadlock, such agreement provides that the two groups shall agree on an impartial umpire to decide such dispute, or in event of their failure to agree within a reasonable length of time, an impartial umpire to decide such dispute shall, on petition of either group, be appointed by the district court of the United States for the district where the trust fund has its principal office, and shall also contain provisions for an annual audit of the trust fund, a statement of the results of which shall be available for inspection by interested persons at the principal office of the trust fund and at such other places as may be designated in such written agreement; and (C) such payments as are intended to be used for the purpose of providing pensions or annuities for employees are made to a separate trust which provides that the funds held therein cannot be used for any purpose other than paying such pensions or annuities; (6) with respect to money or other thing of value paid by any employer to a trust fund established by such representative for the purpose of pooled vacation, holiday, severance or similar benefits, or defraying costs of apprenticeship or other training programs: *Provided,* That the requirements of clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds; (7) with respect to money or other thing of value paid by any employer to a pooled or individual trust fund established by such representative for the purpose of (A) scholarships for the benefit of

employees, their families, and dependents for study at educational institutions, or (B) child care centers for preschool and school age dependents of employees: *Provided,* That no labor organization or employer shall be required to bargain on the establishment of any such trust fund, and refusal to do so shall not constitute an unfair labor practice: *Provided further,* That the requirements of clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds; or (8) with respect to money or any other thing of value paid by any employer to a trust fund established by such representative for the purpose of defraying the costs of legal services for employees, their families, and dependents for counsel or plan of their choice: *Provided,* That the requirements of clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds: *Provided further,* That no such legal service shall be furnished: (A) to initiate any proceeding directed (i) against any such employer or its officers or agents except in workman's compensation cases, or (ii) against such labor organization, or its parent or subordinate bodies, or their officers or agents, or (iii) against any other employer or labor organization, or their officers or agents, in any matter arising under subchapter II of this chapter or this chapter; and (B) in any proceeding where a labor organization would be prohibited from defraying the costs of legal services by the provisions of the Labor-Management Reporting and Disclosure Act of 1959.

APPENDIX B

EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974 (29 USC 1001 *et seq*)

§ 1001. Congressional findings and declaration of policy

(a) The Congress finds that the growth in size, scope, and numbers of employee benefit plans in recent years has been rapid and substantial; that the operational scope and economic impact of such plans is increasingly interstate; that the continued well-being and security of millions of employees and their dependents are directly affected by these plans; that they are affected with a national public interest; that they have become an important factor affecting the stability of employment and the successful development of industrial relations; that they have become an important factor in commerce because of the interstate character of their activities, and of the activities of their participants, and the employers, employee organizations, and other entities by which they are established or maintained; that a large volume of the activities of such plans is carried on by means of the mails and instrumentalities of interstate commerce; that owing to the lack of employee information and adequate safeguards concerning their operation, it is desirable in the interests of employees and their beneficiaries, and to provide for the general welfare and the free flow of commerce, that disclosure be made and safeguards be provided with respect to the establishment, operation, and administration of such plans; that they substantially affect the revenues of the United States because they are afforded preferential Federal tax treatment; that despite the enormous growth in such plans many employees with long years of employment are losing anticipated retirement benefits owing to the lack of vesting provisions in such plans; that owing to the inadequacy of current minimum standards, the soundness and stability of plans with respect to adequate funds to pay promised benefits may be endangered; that owing to the termination of plans

before requisite funds have been accumulated, employees and their beneficiaries have been deprived of anticipated benefits; and that it is therefore desirable in the interests of employees and their beneficiaries, for the protection of the revenue of the United States, and to provide for the free flow of commerce, that minimum standards be provided assuring the equitable character of such plans and their financial soundness.

(b) It is hereby declared to be the policy of this Act to protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts.

(c) It is hereby further declared to be the policy of this Act to protect interstate commerce, the Federal taxing power, and the interests of participants in private pension plans and their beneficiaries by improving the equitable character and the soundness of such plans by requiring them to vest the accrued benefits of employees with significant periods of service, to meet minimum standards of funding, and by requiring plan termination insurance.

§ 1102. Establishment of plan

Named fiduciaries

(a) (1) Every employee benefit plan shall be established and maintained pursuant to a written instrument. Such instrument shall provide for one or more named fiduciaries who jointly or severally shall have authority to control and manage the operation and administration of the plan.

(2) For purposes of this subchapter, the term "named fiduciary" means a fiduciary who is named in the plan

instrument, or who, pursuant to a procedure specified in the plan, is identified as a fiduciary (A) by a person who is an employer or employee organization with respect to the plan or (B) by such an employer and such an employee organization acting jointly.

Requisite features of plan

(b) Every employee benefit plan shall—

(1) provide a procedure for establishing and carrying out a funding policy and method consistent with the objectives of the plan and the requirements of this subchapter,

(2) describe any procedure under the plan for the allocation of responsibilities for the operation and administration of the plan (including any procedure described in section 1105(c)(1) of this title),

(3) provide a procedure for amending such plan, and for identifying the persons who have authority to amend the plan, and

(4) specify the basis on which payments are made to and from the plan.

§ 1103. Establishment of trust

Benefit plan assets to be held in trust; authority of trustees

(a) Except as provided in subsection (b) of this section, all assets of an employee benefit plan shall be held in trust by one or more trustees. Such trustee or trustees shall be either named in the trust instrument or in the plan instrument described in section 1102(a) of this title or appointed by a person who is a named fiduciary, and upon acceptance of being named or appointed, the trustee or trustees shall have exclusive authority and discretion to manage and control the assets of the plan,

• • • •

§ 1104. Fiduciary duties

(a) (1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter.

§ 1105. Liability for breach of co-fiduciary

Circumstances giving rise to liability

(a) In addition to any liability which he may have under any other provision of this part, a fiduciary with respect to a plan shall be liable for a breach of fiduciary responsibility of another fiduciary with respect to the same plan in the following circumstances:

(1) if he participates knowingly in, or knowingly undertakes to conceal, an act or omission of such other fiduciary, knowing such act or omission is a breach;

(2) if, by his failure to comply with section 1104(a)(1) of this title in the administration of his specific responsibilities which give rise to his status as a fiduciary, he has enabled such other fiduciary to commit a breach; or

(3) if he has knowledge of a breach by such other fiduciary, unless he makes reasonable efforts under the circumstances to remedy the breach.

Assets held by two or more trustees

(b)(1) Except as otherwise provided in subsection (d) of this section and in section 1103(a)(1) and (2) of this title, if the assets of a plan are held by two or more trustees—

(A) each shall use reasonable care to prevent a co-trustee from committing a breach; and

(B) they shall jointly manage and control the assets of the plan, except that nothing in this subparagraph (B) shall preclude any agreement, authorized by the trust instrument, allocating specific responsibilities, obligations, or duties among trustees, in which event a trustee to whom certain responsibilities, obligations, or duties have not been allocated shall not be liable by reason of this subparagraph (B) either individually or as a trustee for any loss resulting to the plan arising from the acts or omissions on the part of another trustee to whom such responsibilities, obligations, or duties have been allocated.

(2) Nothing in this subsection shall limit any liability that a fiduciary may have under subsection (a) of this section or any other provision of this part.

(3)(A) In the case of a plan the assets of which are held in more than one trust, a trustee shall not be liable under paragraph (1) except with respect to an act or omission of a trustee of a trust of which he is a trustee.

(B) No trustee shall be liable under this subsection for following instructions referred to in section 1103(a)(1) of this title.

Allocation of fiduciary responsibility; designated persons to carry out fiduciary responsibilities

(c)(1) The instrument under which a plan is maintained may expressly provide for procedures (A) for allocating fiduciary responsibilities (other than trustee responsibilities) among named fiduciaries, and (B) for named fiduciaries to designate persons other than named fiduciaries to carry out fiduciary responsibilities (other than trustee responsibilities) under the plan.

(2) If a plan expressly provides for a procedure described in paragraph (1), and pursuant to such procedure any fiduciary responsibility of a named fiduciary is allocated to any person, or a person is designated to carry out any such responsibility, then such named fiduciary shall not be liable for an act or omission of such person in carrying out such responsibility except to the extent that—

(A) the named fiduciary violated section 1104(a)(1) of this title—

(i) with respect to such allocation or designation,

(ii) with respect to the establishment or implementation of the procedure under paragraph (1), or

(iii) in continuing the allocation or designation; or

(B) the named fiduciary would otherwise be liable in accordance with subsection (a) of this section.

(3) For purposes of this subsection, the term "trustee responsibility" means any responsibility provided in the plan's trust instrument (if any) to manage or control the assets of the plan, other than a power under the trust

instrument of a named fiduciary to appoint an investment manager in accordance with section 1102(c)(3) of this title.

Investment managers

(d)(1) If an investment manager or managers have been appointed under section 1102(c)(3) of this title, then, notwithstanding subsections (a)(2) and (3) and subsection (b) of this section, no trustee shall be liable for the acts or omissions of such investment manager or managers, or be under an obligation to invest or otherwise manage any asset of the plan which is subject to the management of such investment manager.

(2) Nothing in this subsection shall relieve any trustee of any liability under this part for any act of such trustee.

§ 1106. Prohibited transactions

(a) Except as provided in section 1108 of this title:

(1) A fiduciary with respect to a plan shall not cause the plan to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect—

• • • •

(B) lending of money or other extension of credit between the plan and a party in interest;

• • • •

(D) transfer to, or use by or for the benefit of, a party in interest, of any assets of the plan; or

• • • •

§ 1145. Delinquent contributions

Every employer who is obligated to make contributions to a multiemployer plan under the terms of the plan or under the terms of a collectively bargained agreement shall,

to the extent not inconsistent with the law, make such contributions in accordance with the terms and conditions of such plan or such agreement.

(Pub.L. 93-406, Title I, § 515, as added Pub.L. 96-364, Title III, § 306(a), Sept. 26, 1980, 94 Stat. 1295.)

§ 1132. Civil enforcement

Persons empowered to bring civil action

(a) A civil action may be brought—

(1) by a participant or beneficiary—

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

(b) (2) The Secretary shall not initiate an action to enforce section 1145 of this title.

• • • •

Jurisdiction

(e) (1) Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this subchapter brought by the Secretary or by a participant, be-

neficiary, or fiduciary. State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under subsection (a)(1)(B) of this section.

§ 1133. Claims procedure

In accordance with regulations of the Secretary, every employee benefit plan shall—

(1) provide adequate notice in writing to any participant or beneficiary whose claim for benefits under the plan has been denied, setting forth the specific reasons for such denial, written in a manner calculated to be understood by the participant, and

(2) afford a reasonable opportunity to any participant whose claim for benefits has been denied for a full and fair review by the appropriate named fiduciary of the decision denying the claim.

APPENDIX C

29 C.F.R. 2530.200b-2

§ 2530.200b-2 Hour of service.

(1) An hour of service is each hour for which an employee is paid, or entitled to payment, for the performance of duties for the employer during the applicable computation period.

Appendix D

LABOR DEPARTMENT ADVISORY OPINION LETTERS ON DELINQUENT CONTRIBUTIONS

August 31, 1976
Opinion 76-89
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(Re: 10 Civil Actions)

Dear Mr. Dower:

The Secretary of Labor has been served with copies of complaints filed on your behalf in the above-cited cases. While at the present time we do not propose to exercise our right to intervene in any of these cases pursuant to section 502 (h) of the Employee Retirement Income Security Act of 1974 (ERISA), we nonetheless wish to inform you of our views on two matters referred to in your complaints.

> Paragraph 11 of each of your complaints states:
> Unless the Pension Fund receives the contributions due it and can credit the same to the Defendant's employees, those employees will not be entitled to credit for hours worked which will result in their ineligibility for pension benefits upon retirement.

Without expressing any opinion on the law as it existed prior to the effective date of the Employee Retirement Income Security Act of 1974 (ERISA), I would advise you that in our opinion the substance of the position expressed in that paragraph is not lawful under ERISA. ERISA sections 202, 203, and 204, 29 U.S.C.A. §§1052, 1053 and 1054, set minimum participation, vesting and benefit accrual standards which are binding on all covered pension plans. All three sections provide that the satisfaction of their requirements be based solely on each participant's years of service. A "year of service" is defined as the completion of 1,000 hours of service within a designated 12-month period.

Appendix D

The definition of the term "hour of service" was specifically reserved for determination by the Secretary of Labor through appropriate regulations.

On September 8, 1975, a definition of the term "hour of service" was published in the *Federal Register*. Section 2530.200b-2(a)(1) states, "An hour of service is each hour for which an employee is directly or indirectly paid, or entitled to payment, by the employer for the performance of duties during the applicable computation period . . ." Although the Department of Labor will be making certain modifications in these regulations, none of the proposals under consideration would cause a change *in our present position that credit must be given solely on the basis of service performed for a participating employer, regardless whether that employer is required to contribute for such service or has made or defaulted on his required contributions. Any plan term or Trustees' resolution to the contrary is, in our judgment, unlawful and unenforceable.*

• • • •

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December 5, 1978

OPINION 78-28 A

202
203
204
404(a)
406
408(c)
410(a)

Harry A. Dower, Esq.
Dower, Yarema & Co., P.C.
First Valley Bank Building
Center Square
P.O. Box 950
Allentown, Pennsylvania 18105

Re: Central Pennsylvania Teamsters Pension Fund and Teamsters Local 429 Health and Welfare Fund

Dear Mr. Dower:

This is in response to your correspondence of April 18, 1977, May 24, 1977, and August 8, August 16, August 21,

August 31, and November 9, 1978, in which among other matters you request advisory opinions regarding the collection of delinquent employer contributions and the crediting of service in a pension benefit plan under the Employee Retirement Income Security Act of 1974 (ERISA). In addition, you request an advisory opinion regarding the compensation of the trustees of the subject plans. You have supplied us with plan documents and other information. . . . . .

With respect to the first matters mentioned above, you request an opinion whether a multiemployer pension plan may provide that a participant shall accrue benefits only upon the payment of contributions by the employer required to make such contributions. You also request an opinion whether there is an extension of credit by a multiemployer plan to a party in interest where a contributing employer is delinquent in making its required contribution to the plan and the trust instrument provides that the trustees of the plan have no obligation to collect delinquent employer contributions. In connection with this request you also inquire whether the trustees, in the exercise of their discretion under the trust instrument, may adopt a policy not to sue for the collection of delinquent employer contributions.

With regard to the question of whether benefit accrual may be limited to hours for which contributions are received, sections 202, 203 and 204 of ERISA set forth the minimum standards for participation, vesting and benefit accrual. The Department is of the view that, at least for purposes of participation and vesting, credit may not be limited to service for which contributions are actually made. Where no distinction is made between credit for vesting and credit for accrual, all credit must be given solely on the basis of service performed for an employer sponsoring the plan, regardless whether that employer is required to con-

tribute for such service or has made or defaulted on his required contributions.[1] Accordingly, those provisions of the plan documents you submitted which limit employee entitlement by reference to the receipt of employer contributions are not, in our opinion, lawful under ERISA.

Concerning the collection of delinquent employer contributions, you argue that nothing in ERISA directly obligates plan trustees to collect such contributions. You further argue that it is only in connection with an extension of credit by a plan to a party in interest, prohibited under section 406(a)(1)(B) of ERISA, that the question arises. Your letter concludes that, in a multiemployer plan, where the terms of the plan state that no benefit credit will be given until a contribution is actually received by the plan even though a participant has performed the required hours of service, there is no extension of credit to a party in interest and therefore no prohibited transaction.

We do not agree with your argument that, because the plan does not become obligated to pay benefits with respect to particular service until the relevant contribution is received, failure to collect the contribution does not result in an extension of credit by the plan. This is because we do not agree with your premise that benefit credit can be withheld until the contribution is received. As stated above, it is the opinion of the Department that credit must be given on the basis of service, regardless of whether the employer is required to contribute for such service or has made or defaulted on required contributions.

Moreover, in Prohibited Transaction Exemption 76-1 (41 FR 12740, March 26, 1976), the Department stated that multiple employer plans which do not establish and implement reasonable, diligent and systematic collection procedures may be found to be engaging in prohibited transactions under sections 406 and 407(a) of ERISA. The Department also stated that arrangements, agreements or under-

standings whereby a multiple employer plan agrees to the late or delayed payment of employer contributions or payment of less than the full amount of a delinquent contribution, or writes off such a contribution as uncollectable, may also constitute prohibited transactions under those sections.

The collective bargaining agreement which you forwarded to this office requires, in Articles 49 and 50, that employers make contributions to the welfare plan and the pension plan, respectively. The plan trustees are in a position to enforce that duty on behalf of the two plans, and their failure to do so could, in our judgment, result in a violation of section 404(a) of ERISA. To the extent that section 404(a) imposes upon the trustees a duty to collect delinquent contributions, any provision in the plan instruments purporting to relieve the trustees of that duty, or of the power to carry it out, is void under section 410(a).

APPENDIX E

AFFIDAVIT OF DONALD J. WEYERICH, ESQ.

Comes now Donald J. Weyerich, an attorney licensed to practice law in the State of Missouri since 1967; enrolled in the Missouri Bar; admitted to practice in the United States District Court, Eastern District of Missouri, Eastern Division; and the Supreme Court of the United States and first being duly deposed on his oath, states:

On September 26, 1980, the Honorable John K. Regan, United States District Judge for the Eastern District of Missouri, Eastern Division, heard oral arguments as to Petitioner Prosser's Motion to Stay Discovery and Motion to Dismiss. During said oral argument, Judge Regan asked Respondents' counsel the number of cases that counsel had filed on behalf of Respondents in the United States District Court, Eastern District of Missouri, Eastern Division. Counsel replied that he did not know the exact figure, but he may have filed approximately eighty (80) cases. Counsel was under the impression that the Judge was inquiring as to how many cases counsel had filed in the United States District Court, Eastern District of Missouri, Eastern Division since his representation of Respondents, which began several years prior to 1980. At no time in said oral argument did counsel state that all the cases referred to involved alleged delinquent contributions and/or presented questions of interpretation of the underlying Collective Bargaining Agreements. Counsel merely stated an approximate number of cases that had been filed, and was not prepared to state the exact number of cases filed by counsel in the ten years he has represented the Respondent because the issue at bar was the narrow issue of arbitration and not how many cases were pending in the United States District Court, Eastern District of Missouri, Eastern Division at the time of oral argument.

Appendix E

Petitioners' statement that each of the cases presented questions of interpretation of underlying Collective Bargaining Agreements is erroneous. Counsel for Respondents has reviewed his Bi-Monthly Reports, billing records and files to provide a more accurate sampling of the issues in the cases pending as of September 26, 1980. As of September 26, 1980, the Respondent had thirty-six cases pending in the District Court which had been filed between 1977 and September 26, 1980. Twelve of the thirty-six cases, including Prosser and Schneider, presented questions of varying complexity in the interpretation of underlying Collective Bargaining Agreements. Seventeen of the remaining twenty-four pending cases had been settled by settlement agreement, default judgment or consent judgment and were subject to post judgment remedies.

Counsel did not and has not reviewed all cases filed since counsel has represented the Respondents, but if said cases were added to the aforementioned list, counsel is confident that the total number of filed cases would be approximately eighty cases.

(s) DONALD J. WEYERICH

STATE OF MISSOURI)
) SS.
COUNTY OF ST. LOUIS)

Comes now Donald J. Weyerich, being of lawful age and after being duly sworn, states that he has read the foregoing Affidavit and that the facts therein are true and correct according to his best knowledge and belief.

(s) DONALD J. WEYERICH

Subscribed and sworn to before me the undersigned Notary Public, on this 5th day of January, 1984.

(s) BARBARA BENEFIELD
NOTARY PUBLIC

My Commission Expires:
November 18, 1987

[SEAL]